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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 544

SEABOARD MACHINERY CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Seaboard Machinery Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on May 7, 1958, and on petition for rehearing entered June 30, 1958.

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion of the Trial Court, the U. S. District Court for the Northern District of Florida, is reported in 149 F.Supp. 362 and appears herein Appendix A.

The Opinion of the Circuit Court of Appeals is reported

in 256 F. 2d, 166 and appears herein as a part of Appendix B.

Opinion on Rehearing of the Circuit Court of Appeals is also reported in 256 F. 2d 166, beginning at page 172, and appears herein as a part of Appendix B.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on May 7, 1958 and on petition for rehearing on June 30, 1958. The time for filing this Petition for Writ of Certiorari was extended to and including November 28, 1958 by Order of Justice Hugo L. Black. (Appendix C)

The Circuit Court of Appeals has entered an Order recalling and staying its Mandate pending the Petition for Certiorari and until this Court decides the case, if granted. (Appendix D)

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an action involving right to proceeds of fire insurance on portions of a Shipyard leased from the Government, the Circuit Court could accept new Government contentions that it was entitled to more than the fair market value determined by the Trial Court, where the Government had entered into a pre-trial stipulation submitting its claims to the Trial Court on the sole issue of what constituted the fair market value of its loss, and had pleaded accordingly, and where, in reliance upon the stipulation and pleadings of the Government, the Petitioner had abandoned claims made by its pleadings, had made no objection to the striking of portions of its pleadings and to the restriction of its pre-trial discovery, and had limited its proffer of proof at trial to the sole issue of market value as stipulated.

2. Whether the Circuit Court could accept the new Government contentions and theories where, pursuant to a pre-trial stipulation, the Trial Court, in a Memorandum Opinion on a pre-trial motion had made the stipulation limiting the trial of the action to the sole issue of a fair market value of the Government loss the law of the case, and where, without objection by the Government, and with the express concurrence of the Government, the action was heard and determined by the Trial Court upon that single issue.

3. Whether the Circuit Court could accept the new contentions and theories of the Government, although the Government neither alleged or showed, nor did the Circuit Court find, manifest injustice arising from the pleadings, statements and pre-trial stipulation which delineated the claim of the Government before the Trial Court.

4. Whether the Circuit Court, if it could accept the new contentions and theories of the Government, could then render Judgment for the Government based upon its own independent findings on issues never litigated in the Trial Court, and accept as undisputed facts, allegations of the Government made in briefs and relating to the very issues abandoned by the Petitioner in reliance upon the pre-trial stipulation.

5. Whether the Circuit Court correctly held that under a purchase option lease, the lessee had no insurable interest arising from the provisions extending the lease and granting the purchase option, or arising from investment and expenditures by the lessee in connection with the leasehold.

6. Whether the Circuit Court of Appeals correctly held that where a lease provision provided for insurance policies in which the Government only was to be named as assured, but the Government was to receive any proceeds as a stakeholder for the account of all interests, that such a provision makes the Government the sole beneficiary of the insurances.

STATEMENT

This is an action involving the right to proceeds of fire insurance policies in a total amount of $790,300.00. These proceeds were deposited in the Registry of the United States District Court for the Northern District of Florida in connection with a fire loss at the Wainwright Shipyard in Panama City, Florida on December 22, 1952. At the time of the fire loss, the Shipyard was leased by the respondent, the United States of America, to the Petitioner, the Seaboard Machinery Corporation. This lease (R. 507-24) included a purchase option (510-11) which Seaboard exercised and for which, pursuant to Seaboard's action, the Government had established a final price, prior to the fire loss.

On August 22, 1953, Seaboard instituted two suits in the United States District Court for the Northern District of Florida, against various insurance companies for damages from the fire loss, these suits being brought under two policies, one covering realty and the other personalty.

The Government declined to join Seaboard in bringing these suits but on December 21, 1953, was made an Intervenor-Plaintiff on motions of the several insurance companies defendant in the two cases.

Seaboard and the insurance companies negotiated a settlement of the fire losses under which there was deposited in the Court $598,600.00 on account of the realty loss and $191,700.00 on account of the personalty loss. The Government agreed to this settlement made on May 24, 1954 and the insurance companies were thereupon dismissed with prejudice as parties to the litigation on June 23, 1954. Thereafter, the Government filed its pleadings on the two actions.

The two suits were consolidated on September 12, 1955.

Seaboard maintained in the first instance that it was entitled to all the proceeds on the ground that it had exercised its option to purchase the property. The Government denied this proposition and the issue was joined. Seaboard attempted to obtain pre-trial discovery which the Govern-

ment opposed. The Government also moved to strike Seaboard's claim based upon its exercise of a purchase option.

As a result of succeeding pre-trial conferences, it was stipulated that the actions would be limited to a determination of one single issue, the fair market value of the property of the Government destroyed or damaged in the fire.

Pursuant to this stipulation Seaboard abandoned its claim to all the proceeds under its purchase option. Pursuant to the stipulation, such claims were stricken from Seaboard's pleadings by order of the District Court.

Pursuant to this stipulation the Government filed pleadings admitting that it was entitled to compensation only for the actual loss suffered as a result of the fire. Pursuant to the stipulation Seaboard's right to pre-trial discovery was restricted to interrogatories of a limited scope.

The District Court approved the stipulation, and, in fact, in a memorandum Opinion rendered on a pre-trial Motion by the Government reaffirmed its previous approval of the stipulation and made the sole issue of the market value of the Government's loss the law of the case.

The consolidated action was tried without objection of the Government on the sole issue agreed to by pre-trial stipulation of the parties and approved by the District Court.

The Fifth Circuit Court of Appeals reviewed the judgment of the District Court rendered on the single issue of allocating the insurance proceeds accordingly, on the appeal of the Government. The Government not only advanced new theories but specifically disclaimed its pleadings, and pre-trial statements and stipulation. The Government even attached new exhibits to its brief.

The Circuit Court rendered its Opinions reversing the District Court by determining issues not raised in the District Court, in fact precluded by the pre-trial stipulation of the parties. The Circuit Court justified this action firstly

on the ground that the Government in entering into pre-trial stipulation was merely adapting itself "to the exigencies of the [District Court's] rulings," furthermore, that Seaboard was not prejudiced because since the stipulation could be ignored, the Circuit Court was able to decide the case on certain undisputed facts. One of these undisputed facts, so designated by the Circuit Court in its Opinion denying the Petition for Rehearing, was the very fact of the validity of the exercise of the purchase option, squarely placed in issue by Seaboard's original pleadings and abandoned by Seaboard solely in consideration of the pre-trial stipulation of the Government making the sole issue in the case the market value of the loss suffered by the Government.

Thus, this Petition arises from the conviction of Seaboard that the action of the Circuit Court is illegal and inequitable and that review of this action should be taken by this Honorable Court.

The controversy between Seaboard and the Government is rooted in a formal lease agreement executed under date of March 14, 1952 (R. 510-24). Under this lease, which incorporated prior agreements, and later addenda and modifications, Seaboard leased all or, from time to time, various portions of the Wainwright Shipyard, at Panama City, Florida, as well as personalty located therein. The lease agreement provided for a leasehold from September 4, 1951 to September 3, 1954 with a grant of the right and option to renew the lease from September 4, 1954 until September 3, 1957. (R. 509)

The lease also provided for an option to purchase all of the realty and personalty comprising the shipyard at any time after September 4, 1954 and prior to June 4, 1957 for fair value as determined by the Government, subject to the approval of the Secretary of Defense. (R. 510-11). It was further provided that if at any time prior to September 4,

1954, and while the original term of the lease was in effect, the entire shipyard should be made available by the Government, viz. the Secretary of Defense, for disposal to private parties, Seaboard would have an option during such period of availability to purchase the shipyard and its contents for fair value as determined by the Government. (R. 511).

It was the express written understanding of Seaboard and the Government that the purchase option was the essence of the lease agreement. (R. 203-4, R. 245). In reliance on this, Seaboard expended large sums on the leased premises and contents (R. 177), and the District Court found as a fact that, "It [Seaboard] suffered a much greater financial loss as a result of the fire than did Intervenor-Plaintiff [the Government]." (R. 180).

The lease provided that lessee's responsibility and accountability for the entire leased facilities would be based upon a joint inventory and condition survey report (R. 180, 511-12). This report was jointly executed prior to the formal lease and was unique in its form and content, embracing hundreds of legal size pages of history, comments, valuations and other pertinent material. (R. 207-8). Immediately after the execution of the lease, the Government restated this understanding in writing to both its administrative officials and Seaboard (R. 180).

The lease also provided for specific insurances to be furnished by Seaboard during the term of the lease. This included fire and extended coverage insurance. (R. 514). These policies were to be in such amounts and form as the Government should approve. Payment, in the event of loss, was to be made to the Treasurer of the United States, not for the Government but "FOR THE ACCOUNT OF ALL INTERESTS". Inasmuch as this common requirement made the Government trustee of such proceeds, it was provided that the policies should "show" only the Government as the insured. (R. 176). The policies involved in the con-

troversy and preceding policies were actually written with *both* Seaboard and the Government as named insured upon the insistence of Seaboard and without objection at the time by the Government, in order to emphasize Seaboard's beneficial interest in any insurance proceeds. (R. 126-7) and, in the event of a fire loss the Government had the sole option to determine whether to restore the destroyed facilities (R. 515).

Coupled with these insurance provisions were related provisions of applicable statutes and orders and regulations issued pursuant thereto, all incorporated into the lease by reference. (R. 507). Under these governing provisions, the Government could ignore the accountability provisions of the lease in the event of fire loss and could, in its discretion, restore the destroyed property, thus restoring the lessee to status quo. (R. 489-90-91). In such event, the Government was authorized to require that all insurance proceeds, even those which might be obtained independent of the lease provisions by Seaboard, be applied to the restoration of the property destroyed. The regulations provide at Subpart A, Part 113:

> ". . . that all proceeds of any insured, regardless of whether required by any agreement with the Government, must be applied to the restoration of the premises if the Government decides to restore it."

The Government, by its Counsel, admits that under these provisions the Government is rigidly restricted in its use of insurance proceeds contributed:

> "This language, which would cover insurance taken out by the Government as well as appellee, is obviously intended to protect a lessee (i.e., appellee) in the event of a fire and reconstruction by providing that the entire insurance (i.e., the insured value) will be used in rehabilitating the premises and not devoted to other purposes by the Government." (Gov't. Reply Brief, C.C.A. p. 6.)

There are no provisions in the lease or incorporated statutes, orders and regulations, which disturb the applicability of the accountability provisions of the lease itself (R. 511-12), in the event the Government does not elect to restore the property destroyed.

Seaboard insured realty and personalty against fire loss under the lease, binders and policies being issued from time to time to conform with those portions of the Government's property in use. Seaboard insured such property as specified by the Government for its maximum insurable value, i.e., reproduction or restoration cost less depreciation (R. 89, 384). This, of course, represented the only insurance that could be obtained on that particular property under the circumstances, the property being 100% insured (R. 489-91). Seaboard bore the full cost of this insurance.

At the time of the fire loss on December 22, 1952, Seaboard had shortly prior thereto obtained new insurance binders which reflected, in amount, an adjustment arising because of the particular portions of the shipyard in use at that time (R. 115-18). These binders, except in amount, reflect the terms of earlier binders and policies (R. 143-52).

Prior to the fire loss, and on August 14, 1952, Seaboard initiated action under its option clause to purchase the shipyard. On October 9, 1952, the Government, having determined that the property was available for public sale, notified Seaboard that it had determined a fair value of the property and that Seaboard could complete its purchase by the acceptance of that price (R. 224). Under the terms of the lease, Seaboard's option, prior to September 3, 1954 (unlike the option after that date), required a *pre-determination* by the Government, viz. the Secretary of Defense, of the availability for sale of the shipyard (R. 511). After the fire, and on August 21, 1953, no cancellation or limitation having been made by the Government of its sale offer, Seaboard accepted the sale price in writing and asked for

a consummation of the sale (R. 225). The Government refused to consummate the sale on the principal ground that the fire had rescinded Seaboard's option (R. 226).

Prior thereto, and on March 24, 1953, the Government formally confirmed to Seaboard its earlier stated position that it would not restore the destroyed property. (R. 228).

As stated, Seaboard instituted two suits against the insurance companies in August, 1953. Late in 1953, upon Motion of the insurance companies the Government was made a party by the District Court. Pursuant to a stipulation of settlement entered into between Seaboard and the insurance companies, and ratified by the Government, the insurance companies were dismissed with prejudice from the actions.

Seaboard filed amended and supplemental complaints after the dismissal of the insurance companies. Seaboard pleaded that it had duly exercised its option to purchase the property destroyed by the fire and was therefore entitled to all of the insurance proceeds.

Seaboard also alleged its various insurable interests under the lease itself and its right to a portion of the insurance proceeds under the terms of the lease, even in the event it had not exercised its purchase option. (R. 16-25).

Thereafter the Government filed a pleading in the form of a Complaint as Plaintiff-Intervenor. The Government alleged solely with respect to the proceeds from the real property policy that inasmuch as it had established the insurance limits and inasmuch as the lease provisions provided that only the Government should be named as the assured, the Government was entitled to all the proceeds of that policy. (R. 31-35). These contentions and theories were roughly identical with the contentions and theories made by the Government before the Circuit Court, when the Government ignored the intervening pre-trial stipulation and other circumstances upon which the trial Court made its determination.

Inconsistently, the Government pleaded in connection with the proceeds from the policy covering personal property that it was only entitled to the value of its loss in connection with such property.

Thereafter, and in July, 1955, Seaboard noticed extensive pre-trial discovery. The Government moved to quash the Seaboard notices and pursuant to Government Motion the District Court ordered on August 29, 1955 that the parties appear for a pre-trial hearing to consider the simplification of issues, and amendments to pleadings.

The pre-trial hearing went forward on September 9, 1955 in the Chambers of the District Court and was unreported. Pursuant to statements made and stipulations agreed upon, the District Court ordered that the issue of whether Seaboard had exercised its purchase option would not be litigated in the two actions, which were then consolidated on September 12, 1955. On that same date, the District Court issued its formal Order as follows:

> "Ordered, that the issue as to the right of Seaboard Maritime Corporation, successor by merger to Seaboard Machinery Corporation, to acquire from the United States the personal and real property in suit in the above-styled cases will not be litigated herein. . . ."

Pursuant to this order the District Court later ordered stricken those parts of Seaboard's pleadings relating to the issue of the exercise of the purchase option.

Further pursuant to this order the District Court limited pre-trial discovery to interrogatories with respect solely to the issue of the fair market value of the Government's loss as a result of the fire.

In conformity with this order of the District Court the Government on November 1, 1955 (R. 77-79), filed a Reply of Intervenor-Plaintiff to the Amended and Supplemental Complaint of Seaboard, as narrowed by the Order to the District Court to conform to the stipulation making the

sole issue the fair market value of the Government loss. The Government specifically avered:

> ". . . that the purchase of such insurance was to protect the Government against actual loss of such premises."

The Government also specifically admitted as follows:

> ". . . that it is entitled to compensation for the actual loss it suffered as a result of the said fire."

Although the specific statements and stipulation limiting the action to the sole issue of market value of the Government loss and striking Seaboard's claim made on the basis of the exercise of its purchase option, was unreported, there was another trial conference shortly thereafter which was reported. At this pre-trial conference there was an attempt by the Court to delineate the exact limits of pre-trial discovery in accordance with the limited issues. At this hearing on September 27, 1955, the United States Attorney argued vigorously for restriction of pre-trial discovery and made the following statements to the Court (R. 68):

> "The sole issue before this Court is determining the fair market value of the property at the time of the fire."
>
> . . . . . .
>
> "We accept the burden and responsibility of proving the fair market value of it, but all of these things have nothing whatsoever to do with it."

Thereafter, the Government moved for Judgment on the Pleadings on the ground that Seaboard was estopped to make any claim for the proceeds. This Motion was premised upon the allegation that Seaboard was a defaulting lessee because the policies from which the insurance proceeds derived, improperly named both Seaboard and the Government as assured. The District Court denied the Motion, and in a memorandum-decision of July 26, 1956 restated

the stipulation limiting the issues in the action, and making the single stipulated issue the law of the case. The District Court stated (R. 158-59):

> "Suffice it to say as to this question, however, that this Court has already held, and hereby reaffirms, that Intervenor-Plaintiff is entitled to recovery the full marketable value of the property owned by it and destroyed in the fire, and plaintiff is entitled to its day in Court to have such value established by the Court."

The action was tried beginning December 19, 1956. At the very beginning of the trial, Counsel for the Government stated that it was the understanding of the Government, (R. 197):

> "That the Government has a prior lien on these funds and that burden was upon us to show that and what was remaining after that was Seaboard's."

And following this, Counsel for Seaboard stated (R. 200), without objection or comment by the Government that:

> ". . . the issue has been narrowed to the full market value of the property destroyed by the government at the time of the fire."

The action was tried on the sole issue of the fair market value of the Government property destroyed. The burden of the Government proof was that insurable value was the equivalent of fair market value, a contention rejected by the trial Court. The Government also proffered proof, which was rejected by the trial Court that Seaboard was estopped to assert claims because the policies named it as a co-assured with the Government, and, further, on the ground, which was never clearly specified, that Seaboard was estopped to claim any proceeds because the insurance policies had lapsed as far as Seaboard was concerned. (R 431).

The trial Court rendered Judgment based on the trial of the sole issue before it, determined the fair market

value of the Government property destroyed, and awarded the Government that sum from the proceeds.

The District Court, in its Opinion, reported exactly the position of the Government during the trial of the action, as follows (R. 179 and 181):

> "Intervenor-Plaintiff's position in these cases is that it was legally entitled to repudiate the lease and option agreement between the parties as it has done and that it is legally entitled to recover all the insurance money on deposit in this Court, except the sum of $27,080.00, the amount by which its proof of loss for personal property failed to equal the total amount on deposit in this Court for said property."
>
> . . . . . .
>
> "Intervenor-Plaintiff vigorously contends the insurable value of the property covered by the lease represents the fair market value of this property, and in fact made no other further proffer of proof of fair market value. The Court ruled at the time this evidence was not proper, but Intervenor-Plaintiff, despite the ruling of the Court, rests its case upon this proof."

The Government appeal the Judgment of the District Court to the Fifth Circuit Court of Appeals. The Circuit Court reversed the District Court and rendered Judgment for the Government, as set forth in its two Opinions, printed here in Appendix B.

Before the Circuit Court, the Government specified the errors relied upon, and this specification contained the new contention and theory upon which the Circuit Court relied in reversing the Trial Court. As heretofore stated, this contention was new in relationship to the issue litigated in the Trial Court. The same contention had been made in the original pleadings with respect to the proceeds from the real property policy, before consolidation of the actions. This original pleading was filed before the pretrial stipulation and was amended, modified and revised

by pleadings filed in the consolidated action, a year later, in which the Government admitted, pursuant to the pre-trial stipulation that its claim was limited to "compensation for the actual loss it suffered as a result of said fire" (R. 79).

The Government contended before the Circuit Court as follows (Gov't. Brief p. 16):

> "4. The District Court erred in holding that appellee had an interest in the proceeds of fire insurance covering Government owned property, where by contract the Government was to have been named sole insured in the insurance policies."

It was on this new contention, in violation of the pre-trial stipulation, that the Circuit Court gave Judgment for the Government. The Circuit Court adopted the identical specification of the Government. The Circuit Court also incorrectly characterized the requirement that the policies should "*show* the United States only as the insured" by the statement that the policies were required to "name the Government sole insured". The Government specification merely ignored the requirement that the Government was to be paid "for the account of all interests". To all intents and purposes, so also did the Circuit Court ignore this provision.

The Government never denied the pre-trial stipulation which it had made, but in its briefs to the Circuit Court justified its new contention by the argument that the United States Attorney, in proceedings before the District Court made it clear that he specifically reserved the right to assert that market value was irrelevant. (Gov't. Reply Brief, p. 3). The Government supported this allegation principally by reference to its motion for Judgment on the pleadings before the Trial Court which was made after the pre-trial stipulation limiting the issues. The Government did not advise the Circuit Court that the motion

referred to had not ignored the limitation of issues but had merely asserted an equitable estoppel against Seaboard to make any claim to the proceeds because Seaboard named itself as a co-assured in the fire policies.

With only these statements of the Government before it, the Circuit Court justified its action in its original Opinion by the statement (App. B):

> "That it had to adapt itself to the exigencies of the Court's adverse rulings, does not convict it (the Government) of changing horses in mid-stream".

However, after Seaboard's petition for re-hearing, the Circuit Court, in effect, acknowledged the pre-trial stipulation but found that because the lease required that the Government "be the sole named assured", (apparently ignoring the fact that the lease provides, with very different meaning, that the Government shall be named as the assured to receive any proceeds "for the account of all interest"), the Court could justify ignoring the pre-trial stipulation on this ground.

The Circuit Court also maintains that there would be no prejudice to Seaboard which had abandoned its claim of exercise of the purchase option, in consideration of the pre-trial stipulation limiting the issue to the market value of the Government loss, because the Circuit Court finds that it was "an undisputed fact" that the Secretary of Defense had never given approval to the sale.

The Circuit Court ignored, and Seaboard never had the opportunity to point out, that the lease provides that if the option were exercised prior to September 4, 1954, the Government had to approve the availability of the plant for sale, prior to the exercise of the option, rather than as a condition subsequent if the option were exercised after September 3, 1954. Nor did Seaboard have the opportunity to prove its original contention that the files of the Government contained specific consent by the Secretary of Defense

of the exercise of Seaboard's option to purchase the shipyard.

In neither of the two Opinions of the Circuit Court was there cited any authority for the proposition that the United States Attorney had no power to bind the Government, and could not delineate the claim of the Government in its pleadings or by stipulating to the issue to be tried.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals has based its decision on issues not presented to or decided by the Trial Court. This is directly contrary to the position taken by this Court in every case where this question has been presented to this Court.

The cases decided by this Court make it clear that the rule which should have been followed by the Circuit Court is as enunciated in the case of *Hormel v. Helvering*, 312 U.S. 522, 61 S. Ct. 1719 (1941), in which Justice Black stated at page 556 of the Opinion.

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

It is significant that in this action the Government neither alleged nor showed to the Circuit Court, nor did the Circuit Court find any "manifest injustice" which would justify the Circuit Court in doing violence to the established rule.

The decision of the Circuit Court of Appeals based on issues not presented to or decided by the trial Court is also

directly contrary to the decision of this Court in the case of *Virginia R. Co.* v. *Mullins*, 271 U.S. 220, 46 S.Ct. 526 (1925); *Duignan* v. *U. S., et al.*, 274 U.S. 145, 47 S.Ct. 566 (1926); *Virtue* v. *Creamery Package Mfg. Co.* 227 U.S. 8, 33 S.Ct. 202 (1912) and *Becker Steel Co.* v. *Cummings*, 296 U.S. 74; 56 S.Ct. 15 (1935); as well as contrary to the decisions of other Circuits: *Mellott* v. *U. S.*, 257 F. 2d 798 (C.A. 3, 1958) (3 CCA), July, 1958; *Parrott Estate Company* v. *McLaughlin* 89 F.2d 188 (C.A. 9, 1937), in which the Court said:

> "It has been uniformly held that the theory on which the case was tried in the lower Court should be the theory considered on appeal."

2. The Circuit Court has reached its decision by relieving the Government of the effect of its pleadings, statements and pre-trial stipulation, on the basis of which the Trial of the action was limited to a single issue in the trial Court, and on the basis of which, in the light of the Circuit Court decision, the petitioner relied to its prejudice. This action is contrary to rule enunciated by this Court and followed in the other Circuits.

In the case of *Tucker* v. *Alexander*, 275, U.S. 228, 48 S.Ct. 45 (1927) this court specifically ruled that the Government might dispense with issues in an action by stipulation in open court on the trial.

Since that time the Federal Rules of Civil Procedure have been promulgated by this Court. And it has been universally held, until the decision of the Fifth Circuit in this action that the Government is bound in virtually every instance by the actions of its lawyers with respect to delineating or limiting Government claims. For example, in the case of *Daitz Flying Corp.* v. *U. S.*, Ford 372 (D.C., E.D. N.Y. 1945), the District Court propounded what is believed is the application which this Court intended to be applied to Rule 16 of the Federal Rules of Civil Procedure.

That Court stated:

> "The United States is bound by the statements of its attorneys made at a pre-trial conference concerning matters which are properly under consideration by the Court. The Court has signed the order submitted by the plaintiff with certain modifications, which accurately sets forth what the record shows took place at the conference."

In this case as in that one it is submitted that the United States must be bound by the statements of its attorneys made at pre-trial conferences, of which there is an accurate record.

An exhaustive statement of the application of the Federal Rules under these circumstances is contained in the recent decision of the *United States* v. *Fallbrook Public Unility District*, 165 F. Supp. 806, 821 (D. C., S.D. Cal. 1958) that Court faced with almost the identical situation as in this action, and relying upon the authority of this Court found as follows:

> "A necessary exception to this general rule of limited authority, is a stipulation made by an attorney for the government in the course of handling an action. Law suits involving the government could not operate if government attorneys were not authorized to stipulate. They stipulate as to a waiver of jury, as to the testimony of witnesses, who cannot personally be called before the court, as to the facts in pre-trial stipulations and as to the issues and contentions of the government for the purpose of pre-trial.
>
> "Here, Mr. Veeder has not in any sense of the word, transferred, abandoned or given away any rights of the government, if it had any, in this particular situation. He has merely delineated the claim of the government in the nature of stipulating to the issue to be tried. He has further stipulated that state law shall control.
>
> "When a government lawyer prepares a complaint,

he delineates the claim of the government. Whether or not he may be permitted to later amend and widen that claim, is not a matter of right. (Rule 4(h) F.R. Civ. P., 28 U.S. C.A. 3, but depends on rules of law and court action.

"When a government lawyer participates in a pre-trial hearing, he delineates or limits the claim of the government by his statements and by the pretrial stipulation executed and the order thereon. The government like any other litigant may only be relieved by a showing of "manifest injustice" (Rule 16, F.R. Civ.P.) and court determination.

"There is no essential difference between what here occurred and the situations above. The government placed limits on its claim. It agreed California state law should measure its rights. The court has acted on the stipulation. The United States is bound thereby.

"Title 5 U.S.C.A. § 310—'Conduct of legal proceedings' sets forth the authority of the Attorney General and officers of the Department of Justice to conduct legal proceedings. This authority must necessarily include litigation required to establish the rights of the government. Mr. Veeder is an attorney in the Department of Justice. The statements of the Attorney General and Assistant Attorney General of the United States referred to in this memorandum decision, clearly show Veeder's acts were authorized and ratified.

"The following cases bolster our position, *Tucker* v. *Alexander*, 1927, 275 U.S. 228, 48 S.Ct. 45, 72 L.Ed. 253; *Judson* v. *United States*, 2 Cir., 1903, 120 F. 637; *Daitz Flying Corporation* v. *United States*, D.C.N.Y. 1945, 4 F.R.D. 372."

3. The question of the legal effect of pre-trial rules including pre-trial delineation of claims and issues in cases involving the Federal Government is of over-riding importance in the substantial number of civil trials in the Federal Courts. The importance of clear authority as to this matter appears from the statistics of this Court and its subsidiary

Courts showing the accelerated increase of Government cases in recent years. This is demonstrated clearly in the recent opinion of *Fay* v. *U. S.*, 22 F.R.D. 28 (D.C., E.D. N.Y., 1958).

4. The question of interpretation of lease provisions with respect to insurance policies involving property leased by the Government is of unusual importance because of the substantial amount of property leased by the Government.

5. The action of the Circuit Court in reversing the District Court on the basis of new contentions of the Government, and rendering Judgment for the Government forthwith, is contrary to the requirements of due process.

Seaboard was denied a trial of any kind on the issue of the exercise of its purchase option for the property, because of its reliance on statements of the Government which are a matter of record. In view of the State Law of Florida which would be applicable in the event that Seaboard was able to establish a valid exercise of its purchase option, Seaboard has been deprived of a very real right. For the established rule of Florida laid down in the case of *Nelson Properties, Inc. v. Denham*, 167 So. 35 (Sup.Ct.Fla. 1936), in the case of fire insurance carried on property held under lease with option to purchase, the lessee may exercise his option to purchase even after a fire loss.

6. It is submitted that this action should be reviewed because of the basic question of public policy involved, that policy which may be expressed as requiring that when our Government enters the market place in commercial transactions, it is subject to the same fundamental legal precepts in its contractual obligations as a private person. It is submitted that this is a principle deeply embodied in our law which is entitled to slavish adherence. This basic principle has been stated recently in the Circuit Courts in the case of *Century Indemnity Co.* v. *U.S.*, 236 F.2d 752, 756 (C.A.,D.C. 1597).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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November 28, 1958

APPENDIX A

SEABOARD MACHINERY CORPORATION, *Plaintiff*,
and
THE UNITED STATES OF AMERICA, *Intervenor-Plaintiff*,

v.

HANOVER FIRE INSURANCE COMPANY ET AL., *Defendants*.
SEABOARD MACHINERY CORPORATION, *Plaintiff*,
and
THE UNITED STATES OF AMERICA, *Intervenor-Plaintiff*,

v.

AMERICAN EAGLE FIRE INSURANCE COMPANY ET AL.,
Defendants.

Civ. A. Nos. 420, 421.
United States District Court
N. D. Florida
Tallahassee Division.
March 15, 1957.

DE VANE, Chief Judge.

These two cases originated in this Court on August 20, 1953, by plaintiff, Seaboard Machinery Corporation, bringing suits against certain insurance companies to recover damages for fire losses sustained on December 22, 1952, at the Wainwright Shipyard, Panama City, Florida, in which a large part of the buildings and contents under lease to plaintiff by General Services Administration was destroyed.

Prior to the filing of these suits, the United States of America declined to join Seaboard Machinery Corporation in bringing the suits and the United States was made an intervenor-plaintiff on motions of the several insurance companies, defendants in the cases.

After the United States became intervenor-plaintiff in the cases, the insurance companies settled the fire losses with plaintiff and intervenor-plaintiff, and there is now on deposit in the Registry of this Court the sum of $191,700 in Civil Action No. 420 and the sum of $598,600 in Civil Action No. 421. The insurance companies were thereupon dismissed with prejudice as parties to the litigation and the controversy has continued between plaintiff and intervenor-plaintiff as to how the proceeds should be divided between them.

The controversy arises out of a lease, option to purchase agreement, entered into on the 14th day of March, 1952, between the United States of America through its agent, General Services Administration, and plaintiff, the agreement required plaintiff to carry insurance in amounts to be fixed by intervenor-plaintiff upon all buildings and equipment covered by the agreement. The lease agreement was amended from time to time insofar as buildings and equipment were concerned, and the insurance coverage requirements were modified when necessary to meet these changes. The insurance coverage requirement in effect when the fire occurred was $732,000 for buildings and $200,000 for contents.

The intervenor-plaintiff claims the lion's share of all the money on deposit with this Court. It claims the sum of $164,620 in Civil Action No. 420 and $598,600 which is the full amount on deposit in Civil Action No. 421.

Intervenor-plaintiff contends that its share of the insurance money in the Registry of this Court is controlled exclusively by Article Twelve of the agreement between the parties. This Article Twelve is as follows:

"Article Twelve, Insurance:

> During the term of this lease, including any renewal thereof, lessee shall furnish and maintain, at its own expense fire and extended coverage insurance, including coverage for Vandalism and Malicious Mischief, and Boiler and Machinery insurance, in such amounts, with such carriers and in such form as the lessor shall approve. Policies evidencing such insurance shall show the United States of America, acting by and through the Administrator, General Services Administration, only as the insured, and shall provide for payment, in the event of loss, to the Treasurer of the United States for the account of all interests. Policies shall further provide that the insurance companies agree to notify the Regional Director, General Services Administration, 303 Federal Annex, Atlanta, Georgia, thirty (30) days prior to any reduction in the amount or cancellation of the insurance."

Counsel for the parties are in agreement that Sections 631.04 and 631.05, Florida Statutes, F.S.A., places the State of Florida in the category of a "valued policy" state, and that following the fire the insurance companies became liable to the parties for the full amount of insurance coverage by reason of the fire.

The buildings destroyed by fire were valued in the insurance policies for insurance purposes at $598,300, plus blister damage to the workshop of $300, making a total of $598,600. The insurance coverage on the personal property was in the sum of $200,000, and the insurance companies paid into the Registry of this Court for fire losses on this property the sum of $191,700. The difference in the two latter figures is represented by the amount of premiums due on the several policies. Intervenor-plaintiff's claim of $164,620 for personal property also represents the full amount of insurance coverage placed upon the personal

property of intervenor-plaintiff destroyed by the fire.

It is the position of plaintiff, Seaboard Machinery Corporation, that Article Twelve of the lease option agreement has no controlling effect whatever upon the question of the amount intervenor-plaintiff is entitled to recover in these cases. The court has previously held, and plaintiff concedes, that intervenor-plaintiff has a prior lien to plaintiff upon the funds on deposit in the Registry of this Court for the full amount it is entitled to recover in these cases. Plaintiff contends that the amount intervenor-plaintiff is entitled to recover is limited and controlled by the provisions of Articles Five, Six and Seven of the lease option agreement. Article Five of the agreement gives to plaintiff an option to purchase the property, and the evidence in the case shows that on August 14, 1952, plaintiff gave to the General Services Administration notice of the exercise by it of the option to purchase granted to it under said Article Five.

Article Six defines the "assumption of responsibility and liability" of plaintiff for the property leased and Article Seven provides for a "joint condition survey report and inventory of the property" upon termination of the agreement. These sections are the ones that specifically deal with the liability of plaintiff to intervenor-plaintiff for all property covered by the agreement. There is no doubt that had the insurance coverage defaulted for some reason before the fire, intervenor-plaintiff, under the provisions of Articles Six and Seven, could have recovered in full from plaintiff the losses sustained by it.

Counsel for intervenor-plaintiff relies heavily on the fact that Article Twelve of the agreement provided that the "insurance shall show the United States of America, acting by and through the Administrator, General Services Administration, *only* as the insured and shall provide for payment, in the event of loss, to the Treasurer of the United States for the account *of all interests*". (Emphasis supplied.) All

insurance policies in fact named plaintiff and intervenor-plaintiff as beneficiaries, but in law it would have made no difference for the insurance money would have been received by the Treasurer of the United States "for the account of all interests." It necessarily follows from this language that had plaintiff not been named as a beneficiary in the policies, it would nevertheless have been entitled to assert its interests in the proceeds of insurance under Article Twelve of the agreement.

Counsel for intervenor-plaintiff also stresses the point that the insurance coverage for all the property destroyed by fire was only for the amount required by intervenor-plaintiff to be placed upon its property. The evidence in the case shows that plaintiff did considerable repair work on the buildings to place them in condition for use, installed considerable jigs and other fixtures, which became a part of the real estate, and also had in use and located on the premises and destroyed by the fire a considerable amount of personal property, none of which was covered by insurance other than that provided by the coverage required by intervenor-plaintiff.

Plaintiff attempted to introduce considerable additional testimony on this question, but the Court ruled it out as not being germane to the issue before the Court. Suffice it to say here upon this particular question that (as will be fully set out later), the evidence in these cases clearly establishes the fact that the insurance requirements placed upon plaintiff by intervenor-plaintiff far exceeded the market value intervenor-plaintiff placed upon its leased property. Plaintiff was required to pay for all this insurance and since it was protected by the policies along with intervenor-plaintiff, it would have been a wasteful and useless expenditure of money for plaintiff to have carried any additional insurance.

The crux of these cases centers around the question as to the rights of the parties under the lease, option to purchase

agreement. The evidence shows that plaintiff held an option to purchase the entire Wainwright Shipyard properties owned by intervenor-plaintiff prior to September 4, 1954, and while the terms of the lease were in effect. The price to be paid was to be determined by an appraisal made of the property by the intervenor-plaintiff's agent, General Services Administration, immediately following notice of the exercise of the option to purchase. Such notice was given by letter dated August 14, 1952, and in this letter plaintiff offered to pay $550,000 for the entire shipyard property. An appraisal was immediately made by the General Services Administration determining the fair market value of this property as of September 30, 1952, and on October 6, 1952, General Services Administration made a counter-offer to sell the property for the sum of $765,000. This offer carried with it the provision that the property would be sold subject to the National Security Clause and that the final agreement to be entered into between the parties would require the approval of the Secretary of Defense. The appraisal of the General Services Administration on which this offer was made placed an overall fair market value on the entire property of the Wainwright Shipyard, free of the National Security Clause, at $1,215,000, and subject to the National Security Clause at $765,000.

On December 22, 1952, following the interchange of the proposals set out above, a large part of the property under lease by plaintiff from intervenor-plaintiff was destroyed by fire and this catastrophe apparently brought about a lull to further negotiations between the parties with reference to purchase and sale of the property until August 21, 1953, when plaintiff notified intervenor-plaintiff that it accepted the offer of intervenor-plaintiff contained in its letter of October 6, 1952, and offered to purchase the entire Wainwright Shipyard for the amount stated in that offer. It will be noted that this letter was written one day after these suits were instituted.

On October 23, 1953, General Services Administration, acting for intervenor-plaintiff, notified plaintiff that it would not sell any part of the property to plaintiff, and out of this notice this battle royal began. In its letter of October 23, 1953, General Services Administration stated that on October 15, 1953, the Assistant Secretary of Defense, acting for the Secretary, notified it "that the Department of Defense cannot agree to the sale of this facility to Seaboard Machinery Corporation". The letter of the Assistant Secretary of Defense, referred to above, was not filed in evidence in these cases.

Intervenor-plaintiff's position in these cases is that it was legally entitled to repudiate the lease and option agreement between the parties as it has done and that it is legally entitled to recover all the insurance money on deposit in this Court, except the sum of $27,080, the amount by which its proof of loss for personal property failed to equal the total amount on deposit in this Court for said property.

Plaintiff's claim is that it is liable to intervenor-plaintiff under the lease agreement for the full fair market value of all the property destroyed by the fire, and after paying the full value for said property that plaintiff is entitled to the balance of the money left in the Registry of this Court.

[1] There can be no question but that under its lease and option to purchase agreement, plaintiff had an insurable interest in the property under lease as well as in the property it had installed on the leased premises. National Fire Insurance Company of Hartford v. Board of Public Instruction of Madison County, Florida, and C. J. Thomas, 5 Cir., 239 F. 2d 370.

The only important legal difference in these cases and the case just cited is that there the parties stood by their agreements and the insurance company sought the relief, while here the insurance companies stood by their obligations and intervenor-plaintiff is fighting to capture most of the proceeds.

[2] It is the opinion of this Court that the position and contention of intervenor-plaintiff is wrong and that of plaintiff is correct. It makes no difference whether the negotiations for purchase and sale had any binding effect on intervenor-plaintiff, or whether the lease had been cancelled by intervenor-plaintiff following the fire. Plaintiff's interest in the proceeds of the insurance policies vested when the fire occurred. It suffered a much greater financial loss as a result of the fire than did intervenor-plaintiff.

It is the further opinion of this Court that Articles Five, Six and Seven of the lease option to purchase agreement are controlling in determining the amount intervenor plaintiff is entitled to recover because of the loss suffered by it through the destruction by fire of the property leased by it to plaintiff.

As evidence that such was the understanding of the parties at the time of the execution of the lease option to purchase agreement, I quote from an inter-office memorandum dated March 18, 1952, from the Director, National Industrial Reserve Division, PBS, Washington, D. C., to Deputy National Director, PBS, Atlanta, Georgia, as follows:

> "You will also note that the lessee's responsibility and accountability for the entire leased facilities shall be based upon the joint inventory and condition survey report of December 22, 1951. If any work has been done since this survey was made which materially changes the condition of any item, the report should be jointly amended accordingly."

Plaintiff was furnished with a copy of this inter-office memorandum and caused the original to be introduced as evidence in these cases.

[3] The Court finds and holds that intervenor-plaintiff is entitled to recover out of the funds on deposit in this Court in these two cases the full fair market value of its property destroyed in the fire, free of the National Security

Clause, and that plaintiff is entitled to the remainder of the funds on deposit in this Court.

Fair Value of Property Destroyed

Intervenor-plaintiff vigorously contends the insurable value of the property covered by the lease represents the fair market value of this property, and in fact made no other or further proffer of proof of fair market value. The Court ruled at the time this evidence was not proper, but intervenor-plaintiff, despite the ruling of the Court, rests its case upon this proof.

Plaintiff also proffered considerable proof as to fair market value, which the Court held equally improper. Plaintiff sought to prove that in the sale of all wartime property similar to the Wainwright Shipyard, the intervenor-plaintiff had never received a price in excess of 10 or 11% of the fair market value of such property based upon any reasonable appraisal. The Court ruled this evidence out of the case. In response to questions propounded to him, Frank H. Weller, Deputy Director of the Appraisal Division of the General Services Administration, testified this was in fact generally true, but insofar as the Wainwright Shipyard was concerned, his Department was of the opinion that this property was worth considerably more because of its potentiality for use for such purposes as were then being made of the property.

[4] While the option and purchase agreement makes reference to the inventory and condition survey report of December 22, 1951, as containing the yard stick for determining plaintiff's liability and accountability for the property under lease, this Court is of the opinion that in these cases it should use the more recent inventory and appraisal made of the property by General Services Administration dated September 30, 1952. The property has to some extent changed since the report of December 22, 1951, and the use of the September 30, 1952, appraisal represents a val-

uation placed on the property solely and expressly for the purpose of sale. The valuation placed upon the real estate and personal property in this appraisal will, therefore, be used in determining the amount of money intervenor-plaintiff is entitled to receive out of the funds on deposit in this Court.

The December 22, 1951, appraisal of the personal property shows a fair market value of $70,833 and the September 20, 1952, appraisal shows personal property on hand of a value of $100,361. Only part of this property was destroyed in the fire and that part so destroyed is shown in the inventory and appraisal of September 30, 1952, to be of a value of $54,526.01. The Court holds that intervenor-plaintiff is entitled to be paid this amount out of the money on deposit in Civil Action No. 420. The remainder will be paid plaintiff, Seaboard Machinery Corporation.

[5] The September 30, 1952, inventory and valuation report of the real property under lease and destroyed by fire shows a fair market value as follows:

Buildings 18 and 19—Union Melt Shop, etc.	$135,100.00
Building 20—Mold Loft	8,060.00
Building 62—Mold Loft and Template Storage	2,940.00
Total	$146,100.00

To the above figure should be added $300 for blister damage to another building not otherwise injured by the fire. This makes a total fair market value of all the real estate under lease destroyed and injured by the fire as determined by intervenor-plaintiff's agent, General Services Administration, as $146,400. Intervenor-plaintiff will be paid this amount out of the funds on deposit in Civil Action No. 421, and the remainder will be paid to plaintiff.

A final order of distribution in conformity with this Memorandum Decision will be made and entered herein.

APPENDIX B

UNITED STATES OF AMERICA, *Intervenor, Appellant,*

v.

SEABOARD MACHINERY CORPORATION, *Appellee.*

No. 16845

United States Court of Appeals
Fifth Circuit.

May 7, 1958.

Rehearing Denied June 30, 1958.

JOHN R. BROWN, Circuit Judge.

Despite its 528 pages of printed record, exhibits numbering in the hundreds of pages, the complaints, cross claims, counterclaims, extensive pre-trial discovery proceedings, motions for summary judgment, truncated presentation of evidence, and the large dollar amounts at stake, this is a very simple case.

The Government was the Lessor of portions of Wainwright Shipyard at Panama City, Florida to Seaboard Machinery Corporation, the Lessee. The lease required Lessee to procure and maintain insurance against fire in the form and in the amounts specified by the Government.

The Lessee did so. The property thus insured was totally destroyed by fire. The Insurer paid the full insured values into the Registry of the Court. In the controversy remaining between Government and Lessee, the Government, the sole assured, sought what the Insurer had agreed to, and did, pay. The District Court, however, after first denying the Government's motion for summary judgment and a trial thereafter on the merits, denied this claim. The Court held that all the Government got was the money equivalent of the "market value" of this war-built installation. Out of some $800,000 of specified insured values, the Government, the admitted owner, got about $200,000. The remaining $590,000 went to the Lessee.

[1] To justify this unusual result, the Lessee takes an elastic approach. The first is that even though this outcome may be wrong, the Government must fail here because the present appeal is contrary to the theory and position asserted by the United States Attorney in the trial below. Reduced to more tangible terms, it is that here and there in the colloquy between the Court and counsel, which covered two years' time and consumes as much, if not more than, the testimony itself, the United States Attorney agreed that the issue for trial was the "fair market value" of the properties. A fair reading of the record is convincing that these isolated statements never misled the Court as to the Government's position and when made, were made a response to the contemporary situation created by the preliminary ruling, later made formal by the denial of the Government's motion for summary judgment, that all that the Government was "entitled to recover * * * [was] * * * the full marketable value of the property owned by it and destroyed in the fire, and [Lessee] is entitled to its day in Court to have such value established by the Court." By its formal complaints, by the motion for summary judgment and the supporting papers, by memoranda and running objections, the Government took and relentlessly held fast

to its simple contention that what Lessee had agreed to do, and had done, entitled it to the full specified agreed insured values. That it had to adapt [1] itself to the exigencies of the Court's adverse rulings does not convict it of changing horses in mid-stream.

[2] The Lessee must therefore face the intrinsic merits, and these, we believe, reveal that the decision below is clearly erroneous and may not stand.

In a capsulated form, Lessee's contentions are: Since the lease limited accountability to the condition of the premises reflected by the Joint Inventory and Condition Survey [2] Report of December 22, 1951, and required merely that on termination that the property be restored less ordinary wear and tear or, in lieu thereof, Lessee should "* * * pay the Government money in an amount sufficient to compensate for the damage sustained by the Government." [3] Lessee's liability thereunder would be the fair market value

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[1] As a matter of fact, after many times ruling that the "market value" was the measure of the Government's interest in the policy proceeds and allowing the Government to make proof on this, the Court surprisingly rejected as immaterial and irrelevant rather elaborate appraisal evidence prepared and proffered by Lessee. By this stage of the proceedings the Court apparently thought that "market value" was to be measured solely by "fair sales prices" reflected in two GSA appraisals.

[2] The lease provided:

"Article Six. Assumption of Responsibility and Accountability:

"(a) Of Leased Premises:

"Lessee agrees that on September 4, 1951 it took possession of and assumed accountability for that portion of the leased premises * * * and that it will assume possession of and accountability for the balance of the leased premises upon the date of the execution of this lease. Lessee further agrees that its responsibility and accountability for the entire leased premises shall be based upon a Joint Inventory and Condition Survey Report, as of December 22, 1951, signed by * * * Seaboard Machinery Corporation and * * * General Services Administration."

[3] "Article Seven. Termination Joint Condition Survey Report and Inventory:

"At the expiration, termination, revocation or cancellation of this lease, a Final Joint Condition Survey Report and a Final Joint Inventory shall be made and executed by authorized representatives of both parties. Should the Final Joint Inventory disclose any property to be unaccounted for, or worn or damaged in excess of ordinary wear and tear, Lessee agrees to make replacement to the satisfaction of the Government, or in lieu thereof, to pay the Government money in an amount sufficient to compensate for the damage sustained by the Government."

of the premises. Additionally, since liability for breach of an agreement to procure specified insurance may be merely the market value of the uninsured property destroyed,[4] the categorical agreement of Lessee to procure insurance[5] in the amount stated gave it the excess of insurance proceeds over the current market values unless the Government used the proceeds to restore the premises.

We think this confuses too many things and assumes that this fire insurance was required not primarily for the protection of the Government's interest, but for the equal benefit[6] of both Government and Lessee. The Government, as owner of these premises, previously designated by the De-

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[4] The brief of R. Emmett Kerrigan, Esq., amicus curiae, asserts this to be the general rule: "Thus, even without regard to the provisions relating to responsibility [Articles six and seven, notes 2 and 3, supra] for destroyed property, Seaboard would have been liable only for the value of the lost property" and for this cites Ann. Cas. 1918E, page 304: *Jacksonville, M. P. Ry. & Navigation Co.* v. *Hooper*, 1896, 160 U.S. 514, 16 S. Ct. 379, 40 L. Ed 515; *Franck* v. *Stout*, 1909, 139 Wis. 223, 120 N.W. 867; *Bentley* v. *Fayas*, 1951, 260 Wis. 177, 50 N.W. 2d 404, 29 A.L.R. 2d 205; *First National Bank in Tarpon Springs* v. *Bliss*, Fla. 1952, 56 So. 2d 922.

[5] "Article Twelve. Insurance:

"During the term of this lease * * * Lessee shall furnish and maintain at its own expense, Fire and Extended Coverage Insurance, * * * in such *amounts*, with such carriers and in such *form* as the Lessor shall aprove. Policies evidencing such insurance shall show the United States of America, acting by and through the Administrator, General Services Administration, *only* as the *insured*, and shall provide for payment, in the event of loss, to the Treasurer of the United States for the account of all interests. Policies shall further provide that the insurance companies agree to notify the Regional Director, General Services Administration, 303 Federal Annex, Atlanta, Georgia, thirty (30) days prior to any reduction in the amount or cancellation of the insurance.

"In the event of damage or destruction of the leased premises in whole or in part by fire or other causes beyond the Lessee's control, the Secretary of Defense *shall determine* whether the destroyed or damaged buildings or facilities shall be *restored*. If the damage is to the extent that it renders any buildings or facilities wholly untenantable, and it is determined *not* to *restore* such buildings and facilities, the Lesee shall have the right, upon ten (10) days' notice in writing to the Government, to cancel this lease as to the premises rendered untenantable, and the portion of the rental applicable to such premises, as determined by the Government, shall be abated effective as of the date of the damage or destruction." * * * (Emphasis supplied)

Significantly, this clause after stating a sweeping hold harmless agreement also required Lessee to procure and maintain specified *liability* insurance in which *Lessee* was to be the named Assured with the Government named as an additional Assured.

[6] Lessee no longer seriously maintains what it stressed so long below

partment of Defense as a part of the National Industrial Reserve,[7] the Government had, as would any prudent private owner of property, several legitimate business interests which were fulfilled by these lease provisions. First, it desired to exact careful maintenance and upkeep of the premises during the lease term. The consequence for failure to maintain or restore the property would be the obligation to make good the Government's loss, in that case the market value of the premises. But in addition to the contractual security of the financial obligation of the Lessee, the Government wished to make certain that if the premises were destroyed or substantially injured by recognized likely perils, it would have the security[8] of insurance in the

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that actual naming of "Seaboard Machinery Corporation and the United States of America, acting by and through the Administrator, General Services Administration" as the assureds in the previous cancelled policies and the binders effective on the date of the fire, December 2, 1952, enhanced Lessee's rights. It now recognizes that this was in violation of the terms of the contract, note 5, supra, as well as the applicable insurance regulations, War Assets Administration, succeeded by the General Services Administration, Section 105 Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 381, 5 U.S.C.A. § 630c. It now recognizes that its rights are as though the Binder named the United States only as the Assured with the loss payment clause reading: "Payment in the event of loss, to the Treasurer of the United States for the account of all interests."

[7] National Industrial Reserve Act of 1948 (62 Stat. 1225, 50 U.S.C.A. § 451 et seq.). Under Section 4 the property could only be leased or sold subject to a National Security Clause and under Sections 6 and 7, the Secretary of Defense was given a continuing responsibility for preservation of property leased or sold subject to a National Security Clause. This included insurance.

[8] This likewise eliminated the troublesome uncertainties under the law of landlord-tenant or bailments on whether damage from any such cases was "beyond the control" of the lessee (Article 12), note 5, supra, for which Lessee might have a burden of disproving fault on termination and redelivery (Arts. 6, 7, notes 2, 3). The amicus curiae brief points out that even though Licensee was not named as an assured, note 6, supra, the fire insurance procured by it would afford it protection against damages within the policy coverage since the insurers could not maintain subrogation against Lessee after payment to the named Assured, the Government. It cites: *Phoenix Ins. Co.* v. *Erie & Western Transport Co.*, 117 U.S. 312, 6 S. Ct. 750, 29 L. Ed. 873; *Globe & Rutgers Fire Ins. Co.* v. *Hines*, 2 Cir., 273 F. 774, certiorari denied 257 U.S. 643, 42 S. Ct. 54, 66 L. Ed. 413; *Builders & Manufacturers Mutual Casualty Co.* v. *Preferred Auto Ins. Co.*, 6 Cir., 118 F. 2d 118; *Louisiana Fire Ins. Co.* v. *Royal Indemnity Co.*, La. App., 38 So. 2d 807; see 6 Appleman, Insurance Law and Practice, § 4056, pp. 539-541; *Howell* v. *Globe & Rutgers Fire Ins. Co.*, 133 Misc. 193, 231 N.Y.S. 67,

amounts and forms specified by it.

The Shipyard belonged to the Government. It was deemed a part of the essential reserve system for national defense. It was, therefore, eminently proper and good business judgment for the Government to exact the right, and then exercise it, to prescribe insurance in an amount which was the equivalent of cost of reproduction less depreciation.[9] And there can be, of course, no doubt that this was precisely what the Government demanded and obtained.[10]

As the Lessee undertakes its claim to nearly three-fourths of the proceeds of the agreed amount of insurance, the route is a devious one. It seems to be that to have required this insurance was unfair since this put an extraordinary and excessive insurance premium burden on the Lessee for insurance in amounts far exceeding the real value. And, in addition, the Lessee had itself spent several hundred thousand dollars in rehabilitating the properties and in making improvements to put the war-weary plant in shape for use. The first is irrelevant since the contract, note 5, supra, and the requirement letter, note 10, supra, obligated the Lessee in the plainest terms. The second was contrary to the equally plain terms of Article 8 by which Lessee took the property "as-is where-is" with the Lessee being obligated "* * * at its own cost and expense [to] undertake and perform any and all action which may be necessary in the con-

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[9] The regulations prescribed: "The amount of insurance shall be determined with the concurrence of [the] Regional Director, in accordance with policy provisions, on the basis of present day reproduction costs, less depreciation, plus the insurable value of any improvements or betterment. * * *"

[10] As particular buildings, facilities or equipment were added to or temporarily withdrawn from the lease, various supplements were executed which required review and revision of the insurance program. By letter November 20, 1952, shortly before the fire, the Government required fire insurance for particular stated amounts on the buildings subsequently destroyed aggregating $598,675. Binders for that amount were confirmed by underwriters on December 8, 1952.

ditioning and reactivation of the leased premises for its use."

Lessee seeks to overcome the palpable weaknesses in these contentions by insisting that the option to purchase,[11] the mechanism[12] of which they set in motion but never finally consummated, gives a special relevance to the appraisal survey of September 30, 1952. This appraisal survey was made in the fall of 1952 to determine the fair sales price for the whole Shipyard and its equipment either subject to or free from the NSC. With respect to the properties with specified insured values aggregating $598,675, note 10, supra, this appraisal, for each of those buildings subsequently destroyed, showed a fair sales price aggregating $146,400. For the personalty and equipment with a specified insured value of $200,000, of which a total of $164,620 was subsequently destroyed, the appraisal showed a fair sales price of $100,361 for all of it, and $54,526.01 for that part destroyed in the fire. It was on this appraisal that the Court limited the Government's interest in the proceeds to $146,400 and $54,526.01, respectively, see note 13, infra.

[3] The option, as it was called, was of no significance

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[11] Lessee was granted an option to purchase all, but not part of, the premises during the extended period of the lease subsequent to September 3, 1954, and prior to June 4, 1957, at the fair value thereof subject, however, to the approval of the Secretary of Defense and any conditions prescribed by him.

[12] On August 14, 1952, Lessee declared that it exercised the right to buy the Shipyard for the fair value thereof fixed by it at $550,000 payable 10% down and balance over ten years subject to the National Security Clause. October 6, 1952, the Government replied that upon receipt of a proposal for a purchase at a price of $765,000, subject to National Security Clause, payable 20% down and the balance in ten years, the matter would be submitted to the Munitions Board for consideration whether sale would be made and the National Security terms to be prescribed therefor. No response was made to this until August 21, 1953, long after the fire and the day after the filing of these suits against the insurance companies by Lessee. In that letter Lessee declared it was accepting the offer of October 6, 1952, for sale at $765,000 subject to NSC. On October 23, 1953, the Government rejected this for numerous reasons including destruction of the premises by the fire and the total failure of the Secretary of Defense to approve the proposal.

on the insurance. The right of the Secretary of Defense, in the exercise of his duty to reject all offers or proposals on the basis of national security requirements, destroyed its enforceability. The appraisal survey was nothing more than spectacular evidence of the sharp difference between insured values and market or sales value if the Lessee was right on its legal theory.

Indeed, it is this sharp difference and the unwarranted specifying of Lessee as a named assured which demonstrates the wisdom, reasonableness, and the legal validity of the insurance clause of this lease. If the Lessee, either on some theory that it had spent sums to improve or add to the property, or had acquired some elusive unenforceable rights under an option entitling it to negotiate for a purchase, is allowed to claim an interest in the very insurance demanded by the Lessor, the Lessor has not obtained the protection it sought. As insurance limits remain constant once specified, instead of recovering cost of reproduction less depreciation, the Government would have only the right to litigate the difficult question of market value of a facility having none in fact and as to which the reconstruction of a "market value" would exhaust the full storehouse of appraisal techniques. Not only will the Government as Lessor have lost the protection sought, it will have lost it by the curious fact that having exacted performance of the Lessee and the Lessee having performed, the Lessor gets no more than it would had the contract been silent.

The Lessee acknowledges, as it must, that had the Government used the money to restore the premises, see note 5, supra, the Lessee would be entitled to none of the proceeds. Lessee reasons that it would have realized the benefit of this. But this is illusive for the lease had a 90-day unrestrictive cancellation clause and with the option to purchase necessarily so carefully hedged, the Lessee could not have counted on any such benefit. If, as is conceded, the property owner had the right to the control and use of the funds for

its unlimited, exclusive, future use in restored properties, it had the right as well to specify that it alone should get the proceeds and determine as it saw fit how money received as reimbursement for its lost property would be spent.

The contract was to procure insurance in a stated amount. The Lessee did this. The insurers were anxious to, and did, pay. What the Lessee promisd it would obtain for the Government, the Government is entitled to have. The Lessee can claim nothing for having done what it promised to do.

The judgments are reversed and rendered [13] for the Government.

Reversed and rendered.

CAMERON, Circuit Judge, concurs in the result.

On Petition for Rehearing

PER CURIAM.

By a vigorous petition for rehearing lessee asserts that adoption by us of the Government's contentions in complete reversal of its position taken below in this protracted case is a denial of due process. It argues that the "waiver" or "abandonment" by the Government of other issues and submission to the trial of the one fixed by the District Court amounted to a solemn stipulation, the effect of which, in the light of our reversal and rendition, is to have deprived lessee of the opportunity of presenting evidence on (a) the nature and exercise of the option to purchase, (b) naming itself as a joint assured in the fire insurance pol-

[13] In Civil Action 420, the amount in the Registry is $191,700. The District Court allowed the Government $54,526.01 with the balance of $137,173.99 being adjudged to Lessee. The specified insured value of the personalty and equipment damaged in the fire was $164,620. The Government is entitled to this sum.

In Civil Action 421 covering the real property, the total amount deposited by the insurers, $578,400 plus the sum of $20,200 deposited by Lessee for unpaid premiums and salvage value of building scrap aggregated $598,600. The District Court allowed $146,400 to the Government with the balance of $452,200 to Lessee. The entire sum of $598,600 shall be paid to the Government.

icies, (c) the replacement insurance value of the real property, and (d) the extent of damage to and the replacement insurance value of personalty?

[4, 5] We need not further determine whether this was a change of position, a waiver or stipulation. For in neither case can evidence respecting (a) alter the lease contract and the requirements of the National Industrial Reserve Act, see note 7, concerning the option to purchase and the undisputed fact that as there required, consent by the Secretary of Defense was never given, see note 12. For (b) the same is true of the plain, positive requirements of Article Twelve of the Lease requiring the United States be the sole [1] named assured, see note 5.

[6] Nor is anything left for proof with respect to (c) replacement value of realty. Pursuant to Article Twelve of the Lease, the Government by formal letter specified the exact dollar amount of insurance to be obtained for each building, and this precise amount was insured in the policies and subsequently paid by the Insurers, see note 10. It matters not whether actual replacement costs less depreciation was more or less.

[7] As to (d) value of personalty, while there was no schedule as in the case of realty fixing in advance the precise amount of insurance aggregating $200,000 with respect to each item, the District Court in its opinion, by language which we paraphrased in note 13, held that the Government's "* * * claim of $164,620 for personal property * * * represents the full amount of insurance coverage placed upon the personal property of [Government] destroyed by the fire." There was sworn testimony by a competent appraisal expert who, on behalf of the insurance companies,

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[1] Indeed, in its original brief (page 44), Seaboard acknowledged, as we pointed out in note 6, that the rights had to be determined as though the United States were alone named:

"All insurance policies, in fact, named both Seaboard and the Government as assured, but in law it would have made no difference, if only the Government had been named, for the insurance money would then have been paid to the Treasurer of the United States 'for the account of all interests,' i.e., as a fiduciary."

had actualy checked and aproved for payment the Government's detailed Proof of Loss for this precise sum, that the insurable value for each item destroyed or damaged, as well as the total, was a conservative figure on the basis of replacement cost less depreciation. No attack was made on this evidence save to have the witness acknowledge that he was stating the insurable value on this formula and not the present market or fair sales price value.

Petition denied.

CAMERON, Circuit Judge, concurs in the result.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No.

SEABOARD MACHINERY CORPORATION, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 28th, 1958.

/s/ HUGO L. BLACK

Associate Justice of the Supreme Court of the United States.

Dated this 16th day of September, 1958.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16845

UNITED STATES OF AMERICA, *Intervenor, Appellant,*

vs.

SEABOARD MACHINERY CORPORATION, *Appellee.*

Recall of Mandate and Stay of Issuance

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM:

It appearing that the United States Supreme Court has heretofore extended the time for filing Petition for Certiorari to November 28, 1958, and that pending such filing and determination thereof by that Court, no harm will be sustained by the United States, the prevailing party in this Court, by the continued retention of the disputed funds in the Registry of the United States District Court for the Northern District of Florida, it is, upon motion of Appellee, Seaboard Machinery Corporation,

ORDERED that the mandate heretofore issued August 13, 1958, is recalled and its further issuance stayed pending the filing of the petition for Certiorari on or before November 28, 1958, and, if so filed, until the final determination thereof by the Supreme Court.

Enter. Oct. 7, 1958.

APPENDIX E

Excerpts from Lease Dated March 14, 1952

R. 510-11

ARTICLE FIVE. Option to Purchase:

Lessee is hereby granted an option to purchase all, but not part, of the leased premises during the extended period of the lease, if any, subsequent to September 3, 1954, and prior to June 4, 1957, at the fair value thereof, as determined by the Government as of the date of receipt by the Government of notice from Lessee of its intention to exercise the option hereby granted; subject, however, to the approval of the Secretary of Defense, and any conditions prescribed by him, and further subject to any limitations which may be imposed upon the disposal of the property by law or regulations in effect at such time; and provided further, however, that such option shall be formally exercised by Lessee within a reasonable period of time, to be prescribed by the Government, after receipt of advice by Lessee of the amount established by the Government as the fair value of the leased premises; provided further, however, that failure of Lessee to agree to the fair value established shall not interrupt the normal operation of the lease, nor preclude Lessee from again notifying the Government of its intention to exercise the option hereby granted at any time subsequent to ninety (90) days from the date of its rejection of such fair value price but prior to June 4, 1957.

If at any time prior to September 4, 1954, and while the original term of the lease is in effect, the entire shipyard *should be made available by the Government* for disposal

to private parties, Lessee shall have an option, during the period of such availability to purchase the entire shipyard upon the same terms, and subject to the same conditions and provisos as in the case of the option provided for in the last preceding paragraph above.

R. 511-12

ARTICLE SIX. Assumption of Responsibility and Accountability:

(a) Of Leased Premises:

Lessee agrees that on September 4, 1951 it took possession of and assumed accountability for that portion of the leased premises which is described in the Letter Agreement of September 25, 1951, and that it will assume possession of and accountability for the balance of the leased premises upon the date of the execution of this lease. Lessee further agrees that its responsibility and accountability for the entire leased premises shall be based upon a Joint Inventory and Condition Survey Report, as of December 22, 1951, signed by Bert B. Raud, President, Seaboard Machinery Corporation, and Frank H. Weller, Program and Plant Engineer, National Industrial Reserve Division, General Services Administration. A copy of said Survey and Report is on file at the office of the General Services Administration, Washington, D. C., and at the Office of Seaboard Machinery Corporation.

R. 514-515

ARTICLE TWELVE. Insurance:

During the term of this lease, including any renewal thereof, Lessee shall furnish and maintain at its own expense, Fire and Extended Coverage Insurance, including coverage for Vandalism and Malicious Mischief, and Boiler and Machinery Insurance in such amounts, with such carriers and in such form as the Lessor shall approve. Policies

evidencing such insurance shall show the United States of America, acting by and through the Administrator, General Services Administration, only as the insured, and shall provide for payment, in the event of loss, to the Treasurer of the United States for the account of all interests. Policies shall further provide that the insurance companies agree to notify the Regional Director, General Services Administration, 303 Federal Annex, Atlanta, Georgia, thirty (30) days prior to any reduction in the amount or cancellation of the insurance.

In the event of damage or destruction of the leased premises in whole or in part by fire or other causes beyond the Lessee's control, the Secretary of Defense shall determine whether the destroyed or damaged buildings or facilities shall be restored. If the damage is to the extent that it renders any buildings or facilities wholly untenantable, and it is determined not to restore such buildings and facilities, the Lessee shall have the right, upon ten (10) days' notice in writing to the Government, to cancel this lease as to the premises rendered untenantable, and the portion of the rental applicable to such premises, as determined by the Government, shall be abated effective as of the date of the damage or destruction. If the extent of its damage is such as to render the leased premises totally unusable for the continued operation thereof by the Lessee for the purpose for which leased, this lease may be terminated effective as of the date of damage or destruction by either party upon ten (10) days' notice in writing to the other party.

LE COPY

Office-Supreme Court, U.S.
FILED
DEC 24 1958
JAMES R. BROWNING, Clerk

No. 544

In the Supreme Court of the United States

OCTOBER TERM, 1958

SEABOARD MACHINERY CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the District Court appears in Appendix A to the petition for certiorari (pp. 1a–10a) and is reported at 149 F. Supp. 362. The opinions of the United States Court of Appeals for the Fifth Circuit are set forth in Appendix B to the petition for certiorari (pp. 11a–19a, 19a–21a), and are reported at 256 F. 2d 166 and 256 F. 2d 172.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1958 (Pet. App. 11a). Petitioner's motion for rehearing, timely filed, was denied on June 30, 1958 (Pet. App. 11a). By order of Mr. Justice Black, dated September 16, 1958, the time for filing a peti-

tion for certiorari was extended to and including November 28, 1958 (Pet. App. 21a). The petition for certiorari was filed on November 28, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that when the Government leases property, and directs that fire insurance be obtained to cover the property, the Government is entitled to the proceeds of the policies (as against the lessee) when the property is destroyed by fire.

2. Whether the Court of Appeals was correct in rejecting petitioner's contention that the United States had waived its right to the proceeds of the policies by certain statements made during a hearing before the District Court.

3. Whether the petitioners were entitled to be paid on the basis of their alleged "option."

STATEMENT

This action was instituted by petitioner in the United States District Court for the Northern District of Florida against various insurance companies to recover the proceeds of certain fire insurance policies covering property of the United States, leased to petitioner, in which petitioner had named itself as co-insured in violation of its contract with the Government (R. 10–25, 514). The insurance companies, after impleading the United States as party-plaintiff, paid into the registry of court stipulated amounts in full satisfaction of their liability, and the actions against them were dismissed with prejudice

(R. 153). Thereafter, the remaining question of the entitlement of the United States and petitioner Seaboard to the funds was tried to the District Court.[1]

The facts which underlie this action are for the most part undisputed.

1. *The lease* During World War II, the Wainwright Shipyard at Panama City, Florida, built in 1942 and owned by the Government, was used for the construction of liberty ships. After 1945, the facility was vacated and remained unused until 1951 when the General Services Administration (GSA), the federal agency responsible for its maintenance, made a valuation of the facility for sale or rental purposes. Subject to the National Security Clause,[2] the yard was valued at $617,000, and free of the clause at $1,145,000. (S. Exh. 20.)

In September, 1951, after a short period of negotiations, petitioner and the United States, acting through the General Services Administration, entered into an interim letter agreement providing for leasing a part of the yard pending the execution of a formal lease agreement (R. 205). Under this letter agreement, petitioner was obligated to procure, at his own

[1] Petitioner originally instituted two actions against the insurance carriers, one seeking recovery for insured realty and the other for insured personalty. The actions were consolidated for hearing by order of the District Court on September 12, 1955.

[2] Under the National Industrial Reserve Act of 1948 (62 Stat. 1225, 50 U. S. C. 451, *et seq.*), sale or lease of this facility was made subject to a National Security Clause which substantially restricted an occupant's use of the facility. The clause provided for repossession by the Government at its option if needed for national security purposes.

expense, insurance against fire and other hazards with companies and in amounts satisfactory to the Government. Petitioner had been instructed to obtain fire and extended coverage on the leased real property in the amount of $626,000, and on the leased personalty in the amount of $200,000 (R. 130, 132). These stated values were based on an appraisal by the Public Buildings Service of the cost of current reproduction less depreciation of each leased building and of each item of leased personalty (Pet. 16a). Petitioner obtained insurance binders in the amounts specified, but had itself named as co-insured in direct violation of this letter agreement (Pet. 14a–15a).

Thereafter, on March 14, 1952, the formal lease contemplated by the letter agreement was executed (R. 507–524). It is with the construction of this document and its supplements that this litigation is principally involved. The agreement provided for a lease of the entire shipyard for a three-year period with an option of renewal for an additional three-year period (R. 509). Cancellation by either party was authorized upon ninety days prior notice (R. 509). Subject to approval by the Secretary of Defense, petitioner, in Article 5 of the agreement, was given what it has termed an "option" to purchase[3] the yard at a price to be determined by the Government (R. 510–511). Article 12, the interpretation of which was the primary question below, contained comprehensive provisions governing insurance requirements, and the rights and liabilities of the parties if all or a part of the premises were destroyed by fire (R. 514). In

[3] See *infra*, pp. 17–18.

brief, the article provided that petitioner would maintain fire and extended coverage insurance on the leased property at its own expense in such amounts and "in such form" as the Government directed (R. 514). The agreement stated that (R. 514):

> * * * Policies evidencing such insurance shall show the United States of America, acting by and through the Administrator, General Services Administration, only as the insured, and shall provide for payment, in the event of loss, to the Treasurer of the United States for the account of all interests.

In the event of destruction of the leased premises by fire "or other causes beyond the Lessee's control," the Government was given the option to restore the buildings and equipment destroyed, and, if it be determined not to do so, that portion of the lease applicable to the destroyed property could be cancelled at the lessee's option with a proportionate abatement of rent (R. 514–515). Either party could terminate the lease if a substantial portion of the premises were destroyed (R. 515).

Petitioner also agreed in Article 12 to hold the Government harmless from liability for injury to persons or property arising during its occupancy of the yard (R. 515). To assure against this risk, petitioner agreed to obtain general liability insurance (R. 515). However, unlike the fire insurance which was to be carried only for the United States' benefit, petitioner was expressly authorized to name itself as co-insured on the liability policies (R. 515). The lease was made subject to the National Security Clause (R. 523, Article 26).

2. *Events between the execution of the lease and the fire:* On August 4, 1952, petitioner submitted an offer to purchase the leased premises for $550,000 (S. Exh. 11). Pursuant to the offer, General Services Administration made another valuation of the property, and on October 6, 1952, notified petitioner that it valued the yard subject to the National Security Clause at $765,000 (S. Exh. 12). Its letter stated that if an offer to buy the facility were received in this amount it would be submitted to the Munitions Board (the delegate of the Secretary of Defense) for approval of the sale, in accordance with the provision of the lease conditioning the exercise of the option on approval of the sale by the Secretary of Defense. Petitioner did not pursue the matter further at that time.

On October 30, 1952, the parties modified the original formal lease (R. 32) and reduced considerably the area of the leased property. The modified form also provided for a proportionate reduction in rental payments for the period from August 4, 1952 to January 3, 1953 (R. 32). Other provisions of the lease remained unchanged. This agreement provided that (R. 32):

> (3) During the period August 4, 1952 to January 3, 1953 Lessee shall be required to furnish and maintain insurance on only that portion of the entire leased premises as is described in Paragraph (1) above. Such insurance shall be of such types and in such amounts as may be prescribed by the Government.

On November 20, 1952, GSA instructed petitioner, pursuant to the lease modification, to obtain revised

Fire and Extended Coverage insurance covering the Government's real property in the amount of $732,300.00, and specified that the United States should be named the sole insured (R. 106). This letter stated that "The above figures are taken from the latest official appraisal made by this Administration and, therefore, differ from figures previously given you" (R. 107).[4] The letter also directed petitioner to obtain revised liability coverage, and, as with the earlier liability policies, GSA recognized petitioner's right under the lease to have itself named as co-insured on this policy (R. 107).

Petitioner's insurance agent replied to this letter on December 8, 1952, stating that, as of December 4, 1952, insurance in the amounts specified had been obtained and that, in the event of loss, payment under the insurance binders was to be to the "Treasurer of the United States for account of all interests" (R. 108). This letter did not, however, mention the fact that petitioner had had itself named as a co-insured on the Fire and Extended Coverage binders in direct violation of the lease agreement. With reference to this omission, GSA on December 16, 1952, notified petitioner that its insurance agent's letter did not mention the name of the insured, "which must be the United States of America, acting by and through the Administrator of General Services Administration" (R. 111).

On December 22, 1952, a fire destroyed practically the entire leased shipyard (Pet. 6a). Although the fire

[4] Petitioner was also notified by telephone that the former coverage of $200,000.00 on the lease personalty should be continued.

insurance binders had been cancelled by the insurance companies on December 13, 1952, for non-payment of premiums, the cancellation did not become effective until 30 days thereafter, so that the carriers were still liable on the binders.

Petitioner cancelled the lease insofar as it covered the property destroyed on March 12, 1953 (S. Exh. 22), and the Government, acting pursuant to Article 12 of the lease, cancelled the balance by letter of July 21, 1953, effective on August 22, 1953.

3. *Proceedings below.* On August 20, 1953, petitioner filed these actions against the insurance companies named in the fire insurance binders of December 4, 1952 (R. 5, 11). On the following day, August 21, 1953, petitioner wrote to GSA offering to purchase the shipyard for $765,000.00 (Pet. 6a), the valuation placed on the property by GSA (subject to Defense Department approval) in October, 1952. This letter, in form, purported to be an acceptance of an "offer" made by GSA in November, 1952 (see *supra*, pp. 6–7). The United States on October 23, 1953, rejected this "acceptance," stating that it considered the lease to have been cancelled in its entirety (S. Exh. 14).

On December 7, 1953, the Government filed its proof of loss with the insurance companies' agent, General Adjustment Bureau, covering government property insured by the binders and destroyed in the fire (R. 28, 33, G. Exh. 1). In its claim the Government asserted that realty with a value of $598,675.00 and personalty with a value of $164,620.00 had been destroyed in the fire (*ibid.*).

The insurance carriers impleaded the United States as a party-plaintiff in the pending suits by Seaboard. The Government thereafter filed complaints in those actions seeking recovery in the amount of its proofs of loss filed with the insurance companies (R. 26, 31). By stipulation, the carrier defendants paid certain amounts into the registry of court and the actions against them were dismissed with prejudice (Pet. 2a).[3]

Petitioner filed amended and supplemental complaints in both actions, seeking recovery of the bulk of the proceeds on alternative theories: either that it acquired a right to the proceeds by exercising its right to purchase the premises, or that the insurance was intended for its benefit and assured the Government only to the extent that it could prove the "market value" of its property (R. 16, 21).

In March 1956 the Government moved for judgment on the pleadings (R. 96). When this motion was denied (R. 99), the United States filed a motion for summary judgment with supporting affidavits on the ground that the Government was clearly entitled, both under the insurance binders and the lease agreement, to the proceeds on deposit in the court insofar as it represented the stated or insured value of the

[3] Under Florida law, the carriers were liable for the full value stated in the policies. Florida Stats. Ann. §§ 631.04, 631.05 (1956). The carriers paid into court only $578,400.00 in cash in the real property case. The balance, or $20,200.00, representing unpaid premiums and the salvage value of building scrap, was paid into court by petitioner. In the personalty case, the carriers' cash payment amounted to only $191,700.00, since $8,300.00 was deducted on account of salvage value of personal property and unpaid premiums.

Government's property destroyed in the fire (R. 99).* The District Court in a memorandum opinion denied the motion (R. 153). It held that the Government could not recover the insured value of its property as specified in the policies, but instead could recover only its "marketable" value. The court also held that petitioner was entitled to the balance of the proceeds despite the fact that it had no ownership-interest in the insured property (R. 158-159).

Thereafter, the case came on for hearing on the question of the market value of the Government's property. The United States Attorney in participating in this hearing, and consistent with the position of the Government in its motion for summary judgment, repeatedly made it clear that he specifically reserved the Government's original contention that evidence as to market value was irrelevant, and moved to dismiss on this ground at the conclusion of petitioner's initial presentation (R. 335). The Government's participation was limited to establishing the

* It should be noted that the amount of insurance to be carried on property subject to the National Industrial Reserve Act is fixed by standing regulations (R. 87-94). These regulations required that fire insurance be predicated on the basis of the present day reproduction cost, less depreciation (R. 89). With this as a basis, the insured value is, naturally, much higher than the current market value. The reason for the requirement of coverage for the full insurable value computed on the basis of current reproduction costs is that the true worth of this property to the Government is as a potential defense production facility. It is this value and not a "current market value" which the insurance provisions of the regulations were intended to protect.

lease and some of the surrounding circumstances[7] and to attempting to show that it was entitled to the stated insurable value, and not merely the market value.[8] See the reiterated comments of Government counsel at R. 286, 330, 331, 335, 426–432.

In this connection the District Court set out the position of the Government in its memorandum opinion, issued at the conclusion of the hearing, that (R. 179):

> The Intervenor-plaintiff's [Government's] position in these cases is * * * that it is legally entitled to recover all the insurance money on deposit in this Court, except the sum of $27,080.00, the amount by which its proof of loss for personal property failed to equal the total amount on deposit in this Court * * *.[9]

This memorandum decision adopted and amplified the holdings of the court in its earlier memorandum decision denying the Government's motion for summary judgment (R. 173). In brief, the court held

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[7] Most of the evidence bearing on the circumstances surrounding the execution of the lease agreement was rejected by the District Court as "irrelevant and immaterial." (R. 423–441).

[8] Experts for the insurance carriers also testified that the Government's appraisal of its property for insurance purposes, which was incorporated into the binders, was very conservative, being less in every case than the values assigned in an appraisal by the carriers prior to writing the policies (R. 348, 354, 362, 363, 367–374).

[9] During the course of the trial on the fair market value issue, the court again remarked that "they [the Government] have always said that they were entitled to all of the money. * * *" (R. 492).

that petitioner had an interest in the Government's property under lease that exceeded the United States' interest in its own property which the court had already held was limited to the property's market value (R. 179–180); in addition, the court held that, inasmuch as the stated value of the policies was greater than the "market" value, petitioner was entitled to the balance (R. 181).

To determine the market value of the Government's "insured interest" in its own property, the District Court looked to the appraisal made by GSA on September 30, 1952, following petitioner's purchase offer. This appraisal valued the personalty destroyed at $54,526.01 which the court awarded to the Government. The balance (or $137,173.99) was awarded to petitioner (R. 183–184). A fair sale price of $146,100.00 was attributed to the realty by this same appraisal and the court awarded this amount, plus $300.00 for blister damages to one building, to the Government. The balance (or $452,200.00) was awarded to petitioner (R. 185).

On appeal, the Court of Appeals for the Fifth Circuit reversed. (Pet. App. 11a). The court flatly rejected petitioner's main contention, renewed in its petition for certiorari (Pet. 12, 13, 14, 15, 16, 17, 18), that the Government, by arguing that it was entitled to the proceeds based on the insured value of its property, was "in violation of the pre-trial stipulation" (Pet. 15). The court termed petitioner's attack on this point as an "elastic approach" in an attempt to justify the "unusual result" of the District Court whereby petitioner had a greater interest in the Gov-

ernment's property than the Government had (Pet. 12a). The court pointed out that (Pet. 12a–13a):

> By its formal complaints, by the motion for summary judgment and the supporting papers, by memoranda and running objections, the Government took and relentlessly held fast to its simple contention that what Lessee had agreed to do, and had done, entitled it to the full specified agreed insured values. That it had to adapt itself to the exigencies of the Court's adverse rulings does not convict it of changing horses in mid-stream.

With regard to the merits of petitioner's claim to a part of the proceeds, the Court of Appeals pointed out that requiring the lessee to insure the Government's leased property amounted to no more than good business sense (Pet. 16a), and, further, that there was no doubt but what that was exactly what the lessee had agreed to do (Pet. 16a). The court held that, if it were now possible for Seaboard to claim part of the proceeds of policies demanded by the Government, the end result would be that the Government would lose the very protection for which it had contracted (Pet. 18a):

> by the curious fact that having exacted performance of the Lessee and the Lessee having performed, the Lessor gets no more than it would had the contract been silent.[10]

[10] The court succinctly stated its ultimate decision as follows (Pet. 19a):

"The contract was to procure insurance in a stated amount. The Lessee did this. The insurers were anxious to, and did, pay. What the Lessee promised it would obtain for the Government, the Government is entitled to have. The Lessee can claim nothing for having done what it promised to do."

On petition for rehearing, the court again rejected petitioner's renewed argument that "the 'waiver' or 'abandonment' by the Government of other issues and submission to the trial of the one fixed by the District Court amounted to a solemn stipulation * * *" (Pet. 19a). The court held that nothing would be served by a remand since no amount of evidence could change the basic fact that the Government had demanded insurance on its property, petitioner had agreed to and did supply it, and the Government was therefore entitled to the proceeds (Pet. 20a–21a).

ARGUMENT

Petitioner asserts that the questions which it presents are of such "unusual importance" as to require review by this Court (Pet. 21). But its first and main contention is a factual issue peculiar to this particular case, *i. e.*, that the Government somehow waived its right to claim the proceeds from insurance on its own property. This argument was twice rejected by the Court of Appeals, which considered the charge completely refuted by the record. Petitioner's second contention is that the decision of the Court of Appeals that the Government was entitled to the insurance proceeds is "contrary to the requirements of due process" in that it precludes a trial on the question of the exercise of petitioner's "option"—an issue which the Court of Appeals correctly held was irrelevant. Both questions presented by petitioner are not of continuing importance but are limited to the particular factual context in which they arise. No further review is required.

1. By selective citation to the record, petitioner renews here its attempt to show that the United States Attorney waived the basic position taken by the Government in its motion for summary judgment, preserved throughout the trial by running objections, and renewed on appeal, *i. e.*, that the United States was entitled to recover the insured value of its destroyed property (Pet. 12, 13, 14, 15, 16, 17, 18). This contention has no support in the record or in fact.

Early in this protracted litigation the Government took the position that it was entitled to the insured value of its property, stated in the insurance binders and paid into court by the carriers. After its motion for judgment on the pleadings was denied, the Government moved for summary judgment (R. 99–123); the motion leaves no doubt that it was grounded on this theory of the case (R. 100).[11] The District Court, in denying the motion, adopted the contrary theory that the Government was entitled to recover only the current market value of its destroyed property, free of the National Security Clause, and directed that a hearing be held to determine this value (R. 153, 159). Throughout the subsequent hearing, the United States Attorney repeatedly renewed his objection that evidence as to market value was irrelevant, and he

[11] Although petitioner has repeatedly referred to an unreported pre-trial "stipulation" (Pet. 3, 5, 10, 11, 13, 14, 15, 16, 18–21) which supposedly was violated by the Government's claim to the insured value, neither petitioner's opposition to the Government's motion for summary judgment (R. 123–124) nor the memorandum decision of the District Court denying the motion (R. 153) refers to any such stipulation. We know of no such written or oral "stipulation."

moved to dismiss on this ground at the conclusion of petitioner's initial presentation (R. 335).

The District Court was in no doubt that the Government was participating in the hearing only for the purpose of laying a foundation for appeal; the court stated, in refusing further evidence by the Government, that "You have got all you need to reverse me if you think I am wrong and this case goes against you" (R. 431; see especially the colloquy leading up to the District Court's remark (R. 426–431)).

Moreover, this factual contention has already been twice rejected by the Court of Appeals (*supra*, pp. 12–14). As that court observed (Pet. 12a):

> A fair reading of the record is convincing that these isolated statements never misled the Court as to the Government's position and when made, were made in response to the contemporary situation created by the preliminary ruling, later made formal by the denial of the Government's motion for summary judgment, that all that the Government was "entitled to recover * * * [was] * * * the full marketable value of the property owned by it * * *."

This observation by the Court of Appeals, based on its reading of the record, provides the dispositive answer to petitioner's repeated arguments on this point.[12]

---

[12] Since the denial of a motion for summary judgment is not an appealable order (see 28 U. S. C. 1291; *Marcus Breier Sons v. Marvlo Fabrics*, 173 F. 2d 29 (C. A. 2); *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 F. 2d 123 (C. A. 5)), the appeal below was the first opportunity to test the trial court's preliminary decision.

2. Petitioner also argues that the action of the Court of Appeals "is contrary to the requirements of due process" (Pet. 21) in that the decision denied it a trial on the issue of the exercise of its "option." This contention is equally meritless. The lease by its express terms gave a qualified right to purchase. At the time in question, petitioner could buy the property only if (1) GSA declared that it was available for sale; (2) the sale was approved by the Secretary of Defense on the ground that the property was no longer needed as a part of the National Industrial Reserve; and (3) the parties reached agreement on the price determined by the Government (R. 510–511). The first two of these conditions never took place and the third (agreement on a fair price) occurred only after the Government had announced its intention to cancel the lease.

On August 14, 1952, petitioner declared that it exercised the right to buy the shipyard for its fair value, which it considered to be $550,000.00 (S. Ex. 11; Pet. 17a, fn. 12). On October 6, 1952, the Government replied that upon receipt of a proposal for a purchase at a price of $765,000.00, *the matter would be submitted to the Munitions Board* (the Secretary's delegate) *for consideration whether the sale could be made* and, if so, what the national security terms would be (S. Ex. 12; Pet. 17a, fn. 12). No response was made to this letter until August 21, 1953—after the fire had destroyed the property, after these actions had been instituted, and after the Government had cancelled the lease (S. Ex. 13; Pet. 17a, fn. 12). Then, in its letter of response petitioner declared that it

was "accepting" the Government's "offer" to sell at $765,000.00 (*ibid.*). The Government rejected this "acceptance" on October 23, 1953, for a number of reasons, one of which was the failure of the Secretary of Defense to approve the proposal (R. 254).

In these circumstances it was unnecessary to consider below whether or not an "acceptance" by petitioner could be effective after petitioner had received the notice of cancellation, since it cannot be disputed that the Government at no time made an unqualified offer to sell.

In any event, it is clear that petitioner had no true option to purchase; the lease did not create a continuing offer, the acceptance of which by petitioner would constitute a binding contract. Rather, it appears that, at best, the lease gave petitioner an invitation to negotiate a sale. See *Pure Oil Co.* v. *Petrolite Corporation*, 158 F. 2d 503 (C. A. 5), certiorari denied, 330 U. S. 834. The crucial fact that the so-called "option" was conditioned on the approval of the Secretary of Defense led the Court of Appeals to conclude, correctly, that the option was unenforceable.[13]

[13] See *e. g.*, Corbin, *Contracts*, § 261. "If, in return for $10 paid, A merely agrees that if he should wish to sell B shall have the first refusal at $2,000, there is a valid unilateral contract, but it creates no power of acceptance in B, and B has no option." Here, there is not even a fixed price; *a fortiori*, there is no option. Such a contract, in Professor Corbin's words (*ibid.*), "is too uncertain for enforcement."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 544

SEABOARD MACHINERY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF SEABOARD MACHINERY CORPORATION TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY BRIEF OF SEABOARD MACHINERY CORPORATION TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

INTRODUCTION

Petitioner files this Reply Brief for the reason that the Government's Brief in Opposition contains gross errors as to the "Questions Presented" and facts involved in this Petition. Moreover, by its misstatement of the "Questions Presented," the Government has brought into focus an ad-

ditional and extremely important reason for the granting of the Writ.

Pursuant to information obtained from the Clerk of the Court to the effect that such filing would be timely, this Reply Brief for Petitioner is filed on January 6, 1959, and respectively shows as follows:

COUNTER-STATEMENT

Reduced to a bare outline, without inferences or detail, the uncontrovertible facts giving rise to the instant case are as follows:

Petitioner leased part of a shipyard from the United States Government under an agreement of lease which fixed Petitioner-Lessee's responsibility and accountability, gave Petitioner-Lessee renewal privileges and an option to purchase, and required Petitioner-Lessee to procure and pay for fire insurance sufficient to permit reconstruction of any property destroyed. The amounts in which these insurances were required were determined in accordance with a Government Regulation (Pet., p. 8) which, as is conceded by the Government, was intended to protect the *lessee* by providing that in the event of a fire loss, all insurance proceeds should be devoted to the rehabilitation of the premises destroyed; i.e., in the event that the Government determined to restore the premises, proceeds could not be devoted to other purposes by the Government. Petitioner provided insurance in the amounts requested. Having ascertained that, under the law of Florida, the insurance policies became stated-value policies, Petitioner named itself and the Government insured, providing that benefits should be paid to the Government as stakeholder "*for the account of all interests*," thus emphasizing Petitioner's own interest in insuring itself with regard to improvements made by it, the leasehold and option, and policies so stating were in force with the Government's knowledge for more than a year prior to the fire.

A fire occurred, destroying part of the premises. Prior to such fire, Petitioner had indicated that it intended to exercise its option and the Government had set a price in accordance with the option provision, *after* the Secretary of Defense, through his duly delegated Agent, had given the necessary approval and made the determination that the property was available for sale.[1]

After the fire Petitioner accepted the Government's offer to sell the entire Yard at the Government's price. The Government had determined that it would not restore the destroyed property but had not withdrawn or rescinded its offer made under the option in the lease. The Government, however, then cancelled Petitioner's lease, refused to consummate the sale and intervened in two actions which had been brought by Petitioner against the Insurance Companies for the proceeds of the fire insurance, making a claim to all the proceeds of the policies covering the real property. With regard to the proceeds of the policy covering personal property, however, the Government claimed only a *part* of the proceeds (equal to the value of similar property in new condition at current market prices), although the provisions of the lease and insurance contracts were identical with regard to both real and personal property.

Prior to the cases being consolidated for trial, the Insurance Companies paid the full face value of both policies into the Registry of the Court and Petitioner claimed part of the funds on the alternative theories of ownership thereof,

---

[1] The Government's Brief in Opposition invites confusion with its less than candid argument as to the Option. The lease squarely provides that *prior* to September 4, 1954, this approval of disposal of the property was a condition precedent to exercise of the option to purchase. Significantly, it was when this was pointed out by Petitioner to the District Court, and when Petitioner stated that it believed that documentary proof of the sale approval reposed in Government files, that the United States Attorney, after consultation with the General Services Administration, agreed to limit the issue in the case to market value in consideration of Petitioner's abandonment of its claim to ownership of the property destroyed and restriction of pre-trial discovery. (Pet. p. 11-12.)

by exercise of the option, or of being beneficiary of funds exceeding the market value of the Government-owned property lost.

Pre-trial proceedings resulted in a stipulation—later formalized in a Holding by the trial Court—that the issue of the fair value of the Government-owned property lost was the sole issue to be tried. Petitioner's application for pre-trial discovery on issues relating to the exercise of the option and all other issues (except the stipulated issue of fair value of the Government property lost) was denied by the trial Court in accordance with the pre-trial stipulation and ruling, and no other issue was considered in all further pre-trial and trial proceedings.[2]

Pursuant to the agreement of the parties and the ruling of the Court, the Government formally amended its pleadings to claim only the "actual value" of its loss of real and personal property. (Pet. p. 11-12.)

The trial resulted in a Judgment for Petitioner. The Court of Appeals for the Fifth Circuit reversed the trial Court and, *de novo,* adjudicated and determined issues not raised below, considering alleged "evidence" not of Record and rendered Judgment for the Government—holding, in essence, that the stipulation was a mere matter of expediency and that neither the stipulation nor the pre-trial Order were binding on the Government on appeal and that furthermore, Petitioner had no insurable interest in the leasehold and option, nor any right to any part of the proceeds to the extent they were claimed by the Government.

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[2] The Government made a pre-trial Motion for Summary Judgment which has been much relied on by the Government in its Brief in Opposition to support the proposition that the Government took and held to a position that it had the sole insurable interest in the real property lost and never waived any claim to *all* of the insurance proceeds. But, consistent with its stipulation limiting the issues, the Government in its Motion for Summary Judgment before the District Court did *not* claim it had the sole insurable interest in the property destroyed. The Government instead claimed that Petitioner, as "defaulting lessee," was estopped to claim any insurance proceeds because it had named itself co-insured—a novel proposition summarily rejected by the District Court.

ARGUMENT

The above factual situation clearly presents fundamental and far-reaching questions requiring the issuance of the Writ as set out in the original Petition.

The Government, in its Brief in Opposition, completely ignores and side-steps these fundamental questions involving issues of far-reaching importance in the administration of justice in the Federal Courts, as to whether a pre-trial limitation of issues arrived at by stipulation between Counsel for the Government and Counsel for a private party can be set aside, ignored and disregarded by the Court of Appeals.[3] This is done in the face of the express Holding of the Court of Appeals in its Opinion on Rehearing that, "We need not further determine whether this was a change of position, a waiver or stipulation." (Pet. p. 20a.)

The Government ignores and side-steps as important a question as to whether the Court of Appeals can decide a case on issues not tried or presented in the Court below, and on matters dehors of the Record, presented for the first time, to the Appellate Court, by argument in, and "appendices" to the briefs.[4]

The Government completely side-steps and ignores the important question as to whether the Government, in violation of the statutory mandate to use insurance funds for the benefit of the lessee and for the restoration of the premises,

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[3] During the oral argument before the Court of Appeals for the Fifth Circuit, one of the Appellate Judges specifically asked Counsel for the Government whether it was his position that the United States Attorney could not bind the United States Government to a limitation of issues as in the instant case. Appellate Counsel for the Government (who had taken no part in the proceedings below), specifically told the Court that it was the Government's position that the United States Attorney did not have the right to agree to a pre-trial limitation of issues as had been agreed in this case.

[4] For instance, the Appellate Court held that it is an "undisputed fact" that consent was never given by the Secretary of Defense to the sale of the leased Shipyard. There is no word, no phrase, no clause in the entire Record from which even such an inference can be made. In fact, the only inference from the Record is to the contrary.

could, by merely and arbitrarily determining *not* to restore such premises, become the beneficiary of a "wind-fall"[5] and, cover into the Treasury, funds not compensating the Government for any loss, but belonging to private citizens.[6]

The Government ignores and side-steps the fact that it takes inconsistent positions with respect to realty and personalty destroyed.

Still more important, however, the Government, in an attempt to justify its claim to the insurance proceeds and to over-simplify the issues presented below, has inadvertently pointed out that the decision of the Court of Appeals for the Fifth Circuit, if allowed to stand, establishes a new Rule of Law, which is in violation of the holdings of this Court, and, in fact, over-rules and reverses the Law of that same Circuit Court of Appeals:

Analyzing the first "Question" which the Government claims is presented (Brief Opp., p. 2), the Government in effect says:

> When the Government leases property and directs that fire insurance be obtained to cover the property, the Government is entitled to *all* the proceeds of the policies when the property is destroyed by fire.

This is just another way of saying that a lessee can have no insurable interest in leased property, particularly since it is apparent from the Record before the District Court that in the instant case the premium was paid by the lessee and the amount recovered from the Insurance Companies ex-

---

[5] The term "wind-fall" is used advisedly. The property destroyed by the fire, both real and personal, was valued at 16.54% of the total valuation of the Shipyard to the Government for use in an emergency or for sale. (R. 388-9.) The total maximum valuation—the valuation to the Government in the event of emergency—of the destroyed or damaged property, was established by the Government as of September 30, 1952 as $200,926.01. It is for this property that the Government claims it is entitled to cover into the Treasury some $763,220.00.

[6] In its Brief to the Court of Appeals, the Government admitted that if it had determined to reconstruct the lost property, a trust would have been impressed on the funds. (Pet. pp. 8-9.)

ceeded almost four times the maximum fair market value (for any use) of the property destroyed.[7]

Reading the Opinion of the Court of Appeals for the Fifth Circuit, this is indeed the holding of that Court. Ignoring entirely the holdings of the trial Court, ignoring all the provisions of the lease, the Court of Appeals holds in effect that, regardless of the amount of money recovered from the insurance policies, regardless of the special language of these policies, regardless of the provisions of the lease or applicable Statutes and Regulations, Petitioner, the co-insured, who paid for all premiums, has *no* insurable interest under its leasehold, renewal rights or option, and therefore the Government is entitled to all the proceeds.[8]

That even a month-to-month's leasehold and an inchoate right as the option provisions of the lease, convey an insurable interest, is the law as established by many Circuit Courts of Appeals. (See: *Southwestern Graphite Co.* v. *The Fidelity and G. Ins. Corp.*, 201 F. 2d, 553 (C.A. 5, 1953); and *Smith* v. *Royal Ins. Co.*, 111 F. 2d 667 (C.A. 9, 1940), cert. den. *Royal Ins. Co.* v. *Smith*, 61 S. Ct. 43, 311 U.S. 676, 85 L. Ed. 435.

The holding of the Circuit Court of Appeals for the Fifth Circuit, clearly in conflict with these decisions, requires the Granting of the Writ for clarification of this apparent conflict between the instant decision of the Court of Appeals for the Fifth Circuit and its previous decision in *South-*

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[7] In the case of the personal property, the Government conceded that even by its exaggerated measure of "fair market value" (the replacement price), it could not claim the entire insurance proceeds, and therefore in its pleadings and throughout the entire proceedings, did not lay claim to the entire insurance proceeds, but only to a portion thereof.

[8] The Editors of the West Publishing Co. interpret the holding of the Court of Appeals similarly, as is shown by Headnote #2, reading as follows:

"Provision in government's lease of portions of shipyard, requiring lessee to procure and maintain fire insurance in specified amounts, was valid and entitled the government to proceeds of the insurance in the full specified amounts and not merely to extent of market value, though lessee had paid extensive premiums and spent large sums in rehabilitating and improving the property, as required by lease."

western Graphite Co., supra, and the conflict with the holding in *Smith* v. *Royal*, supra, in which this Court denied Certiorari.

Although the foregoing question is one which in and of itself requires review by this Court, Petitioner earnestly submits that the over-riding question for review arises from the action of the Court of Appeals in ruling, in effect, that under circumstances where there is money to be recovered by the Government, the Government is bound only by rules of expediency and not by law. In other words, even though the Government voluntarily, for good consideration, and through its authorized Attorney, limits the issues in a particular case, and only the limited issue is litigated, on appeal (if the decision of the Court of Appeals is permitted to stand) the Government may ask for a hearing *de novo* by a court of appeals based on an incomplete Record and upon additional "evidence" offered in the form of statements of Counsel and "appendices" to briefs.[9]

The Brief in Opposition attempts to gloss over this in its "Argument" by the footnote statement at page 15, that, "we know of no such written or oral 'stipulation.'" Yet, the Government on the next page, p. 16, quoting and adopting language from the Appellate Court's Opinion, admits the existence of this stipulation, but calls it a "contemporary situation created by the preliminary ruling." And, in its "Statement," the Government admits as a fact, at page 13 of its Brief in Opposition, this very stipulation, again quoting and adopting the language of the Appellate Court, but stating in an attempt at justification,

> "That it [the Government] had to adapt itself to the '*exigencies*' of the Court's adverse rulings does not

[9] In its main brief before the Court of Appeals, the Government incorporated in an appendix new exhibits, neither offered nor proffered before the District Court, including the inter-office memorandum of the Government, which was not available to the Petitioner because of the restricted pre-trial discovery.

convict it of changing horses in midstream." (Emphasis supplied.) [10]

The fact remains that there WAS an agreement and stipulation limiting the litigation in the District Court to the sole and single issue of the "Fair Value" of the Government property lost. And only this single issue WAS litigated at the trial in the District Court. And the Government did not, in any way, while this case was pending before the District Court, take a contrary position or even effectively reserve its right to do so.

In its Brief in Opposition, the Government attempts to show that the stipulation (or whatever else it may be called, that the Government entered into to "adapt itself to the exigencies") was not fully adhered to by the Government throughout the District Court proceedings or that sufficient reservation was made, expressly or impliedly, to permit the Government to recede from it on appeal. This is not true, and the Record references of the Government are inaccurate.

The Government now claims that its pre-trial Motion for Summary Judgment was grounded on a theory asserting in effect that Petitioner had no insurable interest under the policies. (Br. Opp. p. 15.) The Record below clearly shows that that motion merely re-introduced (with supporting affidavits) a previous Motion for Judgment on the Pleadings, premised on the novel theory that Petitioner was a "defaulting lessee" and estopped to claim any insurance

[10] The "exigencies" of which the Appellate Court spoke in its Opinion in the Court of Appeals, were brought about by the circumstances, including Petitioner's claim that the option had been fully exercised, Petitioner's statement to the District Court that it had reason to believe that incontrovertible documentary proof of the approval of the sale of the property to Petitioner was available in Government files, and Petitioner's demand for pre-trial discovery, including depositions. After a series of delays, during which time the United States Attorney conferred with the Government agencies involved, Petitioner's discovery was restricted to matters involving the market value of the Government property lost, the Government amended its pleadings to claim only the "actual value" which it had lost, and the issues in the case were limited to the sole issue of the fair value of the Government loss.

proceeds. The alleged "default" was the sole fact that the insurance policies formally named the Petitioner as co-insured. This motion certainly cannot be considered a reservation of right or change of position.

"Reiterated 'comments' of Government counsel," (allegedly supported by a number of Record References, Br. Opp., p. 10) are supposed to support the contention that the Government did not adhere to its stipulation before the District Court. These very references (particularly R. p. 431) indicate that the Government's entire position at trial before the District Court was that "Market Value" approximated or exceeded "Insured Value."

Thus, on the pleadings, and on trial before the District Court, this case was tried and adjudged on the sole issue of the market value of the Government loss. Under these circumstances, even if the entire Record of the District Court had been before the Court of Appeals, there could be no Record on the precluded issues as to the Exercise of the Purchase Option or the Accountability of Petitioner for property destroyed. Even the complete District Court Record (including all Proffers of Evidence), just as the partial printed Record which was before the Court of Appeals, is a record only with respect to the issue of fair market value.

The Government reversed its position in the Court of Appeals. But the Court of Appeals adopted the new Government position. Certainly, under these circumstances, the Court of Appeals' decision stands squarely as a precedent for applying the rules of expediency rather than law to the Government. What the Court of Appeals has said in just so many words, is that what amounts to a binding stipulation when two private citizens enter the market place (or the Courts), is only a transient position when the Government is involved, because of the right of the Government, in the language of the Appellate Court, to "adapt itself to the exigencies of the Court's adverse rulings."

Over and above the far-reaching questions concerning the administration of justice in the Federal Courts, where the Government is a party and conflicting decisions in two Circuits with regard to the Insurable Interest of a Lessee, there is involved in this case a patent violation of the Constitutional rights of the Petitioner to "Due Process." By rendering Judgment on issues not litigated below, by depriving Petitioner of its opportunity to have discovery and introduce evidence on the option and other un-litigated issues, Petitioner was deprived of its "Day in Court." This Court has jealously guarded the right of the citizens of this country to obtain a full and complete hearing in the Courts under its supervision. This Court, through Mr. Justice Holmes, in a case involving a much less flagrant violation of these rights, *Saunders* v. *Shaw*, 244 U.S. 317, 37 S. Ct. 638 (1917), held:

> "He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for *when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view.* The chief justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore *cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.*"
> (Emphasis supplied.)

CONCLUSION

It is respectfully submitted that the Petition for Writ of of Certiorari should be granted in this case.

Respectfully submitted,

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